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# IMO Comments on FHIC AI (Analysis of Impediments)

Institute on Metropolitan Opportunity  
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## Appendix I: IMO Memorandum Provided to HousingLink Regarding AI Requirements

TO: Dan Hylton

FROM: Myron Orfield & Will Stancil

DATE: October 10, 2014

RE: Comments to HousingLink on Legal Requirements Arising from Fair Housing Law and the Analysis of Impediments

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In its mission to provide fair housing choice and achieve residential and social integration, fair housing law places steep fact-finding and remedial requirements on state and local governments and their agents. For recipients of HUD funding, these requirements take the form of an Analysis of Impediments (AI), which is used to certify that the recipient entities are affirmatively furthering fair housing in conformance with their obligations under the federal Fair Housing Act. The AI is an important vehicle for pursuing fair housing, simultaneously identifying the complex factors underlying patterns of housing segregation and discrimination, and offering realistic solutions to the problems existing in a given jurisdiction. In the event of a housing complaint, or if HUD believes monitoring of a jurisdiction is necessary, the agency may consult an AI to determine what, if anything, the suspected violator is doing to address segregation and other problems.

The following memo briefly outlines the extent of existing segregation in Twin Cities neighborhoods and schools, and offers a short summary of several governmental actions which have contributed to the problem. It then discusses the primary obligations of fair housing law, which must be met to ensure compliance with federal statute and HUD rules, with a particular focus on the Fair Housing Act, and on the AI's inquiry into public sector activities. A much more detailed summary, particularly with regards to the specific requirements of the AI, can be found in HUD's Fair Housing Planning Guide, which is available online.<sup>1</sup>

A successful AI must incorporate any evidence relevant to existing violations of the Fair Housing Act. It must also address the broad range of topics covered by the HUD Guide, including not only the detailed analysis of public sector activities discussed below, but also private sector activities and public-private interactions.

## **I. Segregation in Neighborhoods and Schools**

Racial disparities are as great in the Twin Cities as almost anywhere in the country. This is true despite the fact that the region boasts many organizations that are dedicated to reducing inequality. However, many of the efforts originally intended specifically to reduce inequality actually contribute to growing isolation in schools and neighborhoods. For instance, single-race

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<sup>1</sup> U.S. Department of Housing and Urban Development, Fair Housing Planning Guide (1996), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=fhpg.pdf> [hereinafter FHPG].

schools predominate in the region's charter school system<sup>2</sup> and subsidized housing policies help to concentrate housing affordable to very low-income households in the region's poorest neighborhoods.<sup>3</sup> Sadly, in a generous region with great philanthropy, many of our efforts to reduce inequality are making inequality worse.

The Twin Cities area has a reputation for progressive civil rights activism. Minneapolis was the first large city in the country to enact a fair housing ordinance and Minnesota was one of the first states to pass a civil rights law outlawing housing discrimination. Not only did Hubert Humphrey and Walter Mondale hail from the Twin Cities, but so did Roy Wilkins, Clarence Mitchell, and Whitney Young. Republican governor Elmer Anderson pushed the Human Rights Act through the legislature and Congressmen Al Quie helped build a Republican consensus to support the major civil rights acts of the 1960s.

In the 1960s and 70s, the state created a regional government, the Metropolitan Council, and enacted a fair-share requirement in the Metropolitan Land Use Planning Act that required that all suburban communities provide for their fair share of affordable housing. The Met Council worked with the Minnesota Housing Finance Agency to adopt the nation's best regional fair housing program. Also in the early 70s, Minneapolis integrated its public schools pursuant to court order, and the state government used the momentum created by this lawsuit to adopt a desegregation rule that required racially integrated schools throughout Minnesota.

As a result of all of these efforts in the 1970s and early 1980s, the Twin Cities was on a path to become one of the most integrated metropolitan areas in the United States. It had all the tools in place to do so, and they were working as planned. In the early 1990s, only about 2,000 (or 2.5 percent) of the region's non-white students were in schools that were more than 90 percent non-white<sup>4</sup> and only 3 percent of the region's population lived in majority non-white, high poverty areas.<sup>5</sup>

During the next two decades, this all changed. By 2010 the number of schools with more than 90 percent non-white students had increased more than seven-fold (from 11 to 83); the number of non-white students in those schools had risen by more than 10 times (from 2,000 to 25,400), an increase in the percentage of non-white students in highly segregated environments from 2.5 percent to 16 percent; and the percentage of the regional population in majority non-white, high poverty areas rose by three times to 9 percent.<sup>6</sup> Today, the two central cities together only contain about 20 percent of regional population, but nearly 60 percent the region's subsidized affordable housing: 37 percent in Minneapolis and 22 percent in Saint Paul.

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<sup>2</sup> See IMO reports "Failed Promises: Assessing Charter Schools in the Twin Cities" (2008), "Update of IRP's 2008 Report on Charter Schools in the Twin Cities" (2012), and "Charter Schools in the Twin Cities: 2013 Update" (2013), available at <http://www.law.umn.edu/metro/school-studies/school-choice.html>.

<sup>3</sup> See IMO report "Reforming Subsidized Housing Policy in the Twin Cities to Cut Costs and Reduce Segregation" (2014), available at <http://www.law.umn.edu/metro/index.html> and forthcoming in *Housing Policy Debate*.

<sup>4</sup> School data are for the 11 Minnesota counties in the Twin Cities metro area in 1995 and are from the Minnesota Department of Education.

<sup>5</sup> 1990 data from Metropolitan Council, *Choice, Place and Opportunity: An Equity Assessment of the Twin Cities Region*, March, 2014, Section 5, page 5.

<sup>6</sup> Ibid. Section 5, page 5.



Some of these changes simply reflect the fact that the region became more racially diverse during the period. However, other metros of roughly the same size and with similar demographic histories have not shown the same pattern of deterioration. For instance, the number of schools in the Portland metro with more than 90 percent non-white students was just 2 in 2009 (up from 0 in 2000); in Seattle it was only 25 (up from 14); and in Pittsburgh it was 25 (down from 27).<sup>7</sup> The neighborhood comparisons are no better. In 2012, 19 percent of low-income black residents of the Twin Cities lived in high-poverty census tracts (up from 13 percent in 2000) compared to just 3.4 percent of low-income black residents in Seattle (down from 3.5 percent in 2000) and 1.6 percent in Portland (down from 1.9 percent in 2000).<sup>8</sup>

These imbalances have major impacts on segregation in the region's schools. A more proactive approach to the location of LIHTC, Section 8 project-based housing and Section 8 voucher-eligible rental units could have made a serious dent in segregation in the region's schools. An IMO simulation of what the racial make-up of the region's school would be if the existing subsidized housing stock were distributed more evenly across the region shows this very clearly. The simulation shows that if Section 8 voucher usage was distributed evenly across the region and the distribution of households was race-neutral, a total of 5,531 nonwhite students currently in predominantly nonwhite schools would instead be attending a racially balanced school. Adding the effects of equalizing the distribution of LIHTC and Section 8 project-based units increases the total number of nonwhite students in racially balanced schools to 9,729.

This represents a very substantial share of the total number of student moves that would be needed to completely eliminate racially segregated schools (predominantly white as well as predominantly nonwhite) in the region. In fact, it represents between two-third and four-fifths of the number of students who would need to change schools to reach that objective.<sup>9</sup> In other words, if subsidized housing was currently distributed more equitably, it would be unnecessary to even discuss perennially controversial topics like pro-integrative school boundary reforms or the third rail of school reform – bussing.

Not surprisingly, the region now shows some of the widest racial disparities in the country. Recent data show alarming gaps between whites and non-whites in income, unemployment, health, and education. Poverty rates for black Minnesotans are more than four times those for whites while household incomes for blacks are less than half of those for whites; reading proficiency rates for black students are less than half those for whites in most school grades and years; incarceration rates for blacks are 20-25 times greater than for whites; and black unemployment rates are two to three times those for whites. All of these disparities put the region and the state near the bottom of national rankings.<sup>10</sup>

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<sup>7</sup> Data are from the National Center for Education Statistics. The equivalent numbers for the Twin Cities from this source were 112 schools with more than 90% non-white students in 2009 compared to 37 such schools in 2000.

<sup>8</sup> Bureau of the Census data compiled and provided by Paul Jargowsky and the Center for Urban Research and Education, Rutgers University. Similar differences for Hispanic residents exist across the metros.

<sup>9</sup> The actual percentage depends on the assumptions made about the willingness of white households and students to “replace” non-white students in schools that are now predominantly non-white. See “Why is the Twin Cities so Racially Segregated and What Can Be Done about It?” IMO, forthcoming.

<sup>10</sup> See Rose, Jonathan M., “Disparity Analysis: A review of disparities between White Minnesotans and other racial groups,” Council on Black Minnesotans, 2013 and various reports available at <http://minnesotabudgetbites.org> for a summaries of racial disparities in the state.

## II. Impediments to Integration

Although a number of factors contribute to residential and school segregation, one major factor that is frequently overlooked are the housing policies of state, local, and regional agencies. Not only do governmental entities have the ability to substantially regulate the siting of affordable housing (and therefore the distribution low-income families), they also directly subsidize a very significant share of the region's affordable units. Despite this, few agencies have policies designed to fight segregation and promote integration. In the rare instance that the subject is addressed, the remedies adopted are manifestly inadequate, the effects overwhelmed by countervailing measures. Worse still, the refusal to proactively consider the problem of integration has led to the adoption of a number of aggressively segregative policies, while local governments remain blithely unaware that they are contributing to racial isolation and division.

### 1. Distribution of Affordable Housing

Affordable housing in the central cities is typically segregated twice over: both at the municipal level and at the neighborhood level. First, by restricting access to housing to the two core cities, state, local, and regional governments have prevented racial minorities from accessing the many entry-level jobs and high-quality schools found in the suburbs. For instance, between 2002 and 2011 more units of subsidized, very low-income housing were added in Minneapolis and St. Paul added than were built in all of the suburbs combined. The region produced 2,249 new very affordable units (affordable to those earning 30 percent of the metro median income) during those years.<sup>11</sup> *Ninety-two percent* were produced in the central cities, which have only 23 percent of the region's population.<sup>12</sup> In other words, the central cities received four times their fair share of very low-income units. Virtually all of these units were located near segregated or re-segregating schools. Of the 7,253 new *and preserved* very affordable units from this period, 74 percent were in the central cities or 3.2 times their fair share.<sup>13</sup>

Beyond that, however, affordable housing *within* the cities is also far more likely to be placed in a segregated neighborhood than affordable housing elsewhere. For example, in Minneapolis, the quartile of census tracts with the highest minority populations contain only 17 percent of all housing units but 49 percent of subsidized units, while the quartile with the lowest minority population contains 30 percent of total units but a mere 1.3 percent of subsidized units. The highly segregated neighborhoods where affordable units are located are almost universally afflicted by a range of severe problems: extremely low incomes, low economic opportunity, poor health outcomes, poor educational opportunity, and predatory or nonexistent lending.

The Metropolitan Council, Minnesota Housing (MHFA), Minneapolis, and Saint Paul have all played a role in creating this multilayered segregation. Below, a handful of the most important segregatory policies are described.

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<sup>11</sup> HousingLink, *2011 Housing Counts*.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

## 2. The Metropolitan Council

First, the Met Council, under the state's Land Use Planning Act, has a statutory obligation to require that municipal comprehensive plans adequately provide for local housing needs, including by providing land zoned for low and moderate housing needs.<sup>14</sup> But in recent years the Council has declined to enforce this provision, resulting in exclusionary zoning and an upsurge of affordable development in the urban core.

The Met Council also has also begun setting affordable housing goals for municipalities under the Livable Communities Act (LCA). These goals change over time – one set was in force between 1996 and 2010, and another set was recently created for the years 2011 through 2020. Unfortunately, the Council has adopted the practice of assigning the highest goals to the central cities and racially transitioning inner-ring suburbs.<sup>15</sup> This appears to be in part because, in the previous LCA round, these are the areas which most successfully hit their targets. (The two central cities built 100 percent of their negotiated goal, and many of the poorer suburbs built over half.) Meanwhile, the wealthier suburbs, which frequently built less than 20 percent of their goals, saw their targets negotiated downwards. The end result is a policy that is backwards, from a fair housing standpoint: building a fair share of low-income housing only begets higher affordable housing goals.

The Met Council's other funding sources are also heavily weighted towards the central cities. For instance, the Met Council maintains "Housing Performance Scores," ranking nearly 200 communities for priority receipt of housing funding.<sup>16</sup> Saint Paul and Minneapolis are first and second on the list, respectively; most of the inner-ring suburbs are in the top quartile; and many white outer-ring suburbs are in the second quartile or below. As a result, when funding for affordable units is available, it is prioritized for the cities that have previously constructed the most affordable housing. Ironically, this system mirrors the carrot-and-stick approach often favored by fair housing advocates, in which funding for municipalities is conditioned on their willingness to provide fair housing choice. But by applying the system to *only* housing funds, the Met Council creates the exact opposite effect: municipalities reluctant to accept low-income or racially diverse populations are only denied housing they never wanted in the first place.

## 3. LIHTC

Additionally, the state's single largest source of affordable funding for new construction, the Low Income Housing Tax Credit (LIHTC), is disproportionately allocated to the cities, which receive, on average, 45 percent of the entire region's yearly tax credit share. The same is true for all federally supported housing programs. Section 8 vouchers are placed in an even more segregated pattern. This is the result of policies instituted by the Met Council and Minnesota Housing. LIHTC are provided by the federal government, but states may develop their own distribution systems. In most of the Minnesota, MHFA serves as the primary agency for allocating tax credits. In the metro region, however, Minneapolis, Saint Paul, Dakota County,

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<sup>14</sup> Minn. Stat. 473.854; Minn. Stat. 473.859 subds. 2, 4.

<sup>15</sup> See Metropolitan Council, Livable Community Act Negotiated Goals 2011-2020.

<sup>16</sup> Metropolitan Council, Housing Performance Scores 2013.

and Washington County are all considered “suballocators.”<sup>17</sup> Suballocators receive a predetermined portion of the metro area’s tax credit share each year, which their respective housing agencies can allocate independently. By statute, the Met Council has discretionary authority to set these suballocator shares, in collaboration with MHFA.<sup>18</sup> The Met Council has chosen to distribute suballocator shares in a highly segregative fashion: it gives Minneapolis and Saint Paul a combined 35 percent of the regional tax credits, despite the fact that the cities themselves are highly nonwhite, and furthermore, have demonstrated a consistent pattern of funding affordable housing in segregated neighborhoods. Through a “nonprofit set-aside,” some projects in the two central cities are eligible for another 10 percent of the metro’s total tax credits. MHFA, which has the ability to adjust the Met Council’s allocations, has instead retained this segregatory policy.

After passing through the suballocator system, tax credits are assigned to individual projects by a competitive point system, which prioritizes projects on the basis of project characteristics. MHFA, Minneapolis, and Saint Paul all maintain point systems which heavily emphasize characteristics likely to be satisfied by segregated developments in the urban core – e.g., geographic proximity to light rail and bus rapid transit, homeless housing, use of preexisting infrastructure, single-room occupancy units, and the incorporation of a neighborhood stabilization plan – but place very little emphasis on characteristics likely to be satisfied by integrated or suburban developments.<sup>19</sup> For example, the MHFA system assigns hundreds of possible points, but only five are available for economic integration, and none at all for racial integration. The central cities’ point systems are similarly uneven, a factor which contributes greatly to their highly segregative placement of units.

### **III. Fair Housing Law Summary**

Fair housing law has developed along several parallel tracks for the better part of 50 years. Today, almost all discriminatory housing practices are prohibited at the federal level by a bevy of statutes and rules, such as the Equal Credit Opportunity Act, the equal protection provisions of the Fourteenth Amendment, and the Civil Rights Act of 1866. However, the most important protections derive from the Fair Housing Act of 1968 (FHA), which has been tailored by the courts and by Congress to address the specific harms of housing discrimination.

In particular, the FHA, unlike other civil rights laws, specifically proscribes public and private activities that tend to perpetuate racial segregation among a population – for instance, siting low-income housing in areas of concentrated minority population. It also allows plaintiffs to bring claims on the basis of “disparate impact,” even when a defendant had no discriminatory intent. This both reduces the evidentiary burden on potential FHA plaintiffs, and increases the importance of empirical and statistical evidence when a violation is alleged.

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<sup>17</sup> Minn. Stat. 462A.222.

<sup>18</sup> Minn. Stat. 462A.222 subd. 4.

<sup>19</sup> MHFA, LIHTC Self-Scoring Worksheet 2015; Minneapolis Department of Community Planning and Economic Development, LIHTC Self-Scoring Worksheet 2015; Saint Paul Housing Redevelopment Agency, LIHTC Self-Scoring Worksheet 2015.

Finally, the FHA was intended to roll back segregation, not merely prevent its further advance. It accomplishes this by requiring federal agencies, and state agencies receiving federal housing funds, to “affirmatively further fair housing.” As a result of this provision, most government bodies involved in housing are obligated to enact measures that facilitate housing choice and integration, even if their activities do not otherwise promote segregation or discrimination.

Following below are summaries of the most salient provisions of the law, and more detailed descriptions of their requirements.

### 1. 42 U.S.C. § 3604(a)

The FHA’s § 3604(a) declares that it shall be unlawful to make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status or national origin.<sup>20</sup> The expansive language of this provision – in particular, “otherwise make unavailable or deny” – has been held to create a broad prohibition against a wide array of discriminatory housing practices. In addition to refusals to sell or rent, § 3604(a) also covers racial steering, discriminatory or exclusionary zoning, redlining, and discriminatory appraisals.<sup>21</sup> This list is non-exhaustive; courts have demonstrated a willingness to apply the § 3604(a) prohibition to any number of unforeseen scenarios with discriminatory consequences.<sup>22</sup> In the words of the Southern District of New York, this provision “has been construed to reach every practice which has the effect of making housing more difficult to obtain on prohibited grounds,” and it is accordingly at the heart of most FHA claims.<sup>23</sup>

### 2. 42 U.S.C. § 3605

In § 3605, the FHA explicitly extends its protections to the realm of real estate financing, prohibiting “discriminat[ion] against any person in making available” loans or financial assistance for “purchasing, constructing, improving, repairing, or maintaining a dwelling,” as well as discrimination in loans “secured by a dwelling.”<sup>24</sup> In order to ensure that the statute does not interfere with legitimate underwriting activities, the section does specify that lenders are allowed consider non-protected characteristics when making loans.<sup>25</sup> This allowance, however, does not permit potential defendants to avoid liability by simply generating underwriting criteria which have the effect of serving as a proxy for a protected characteristic; instead, as recent HUD regulations make clear, a lender’s activities are sufficient to trigger § 3605 liability if they have unjustifiably discriminatory effect on a protected class, regardless of intent.<sup>26</sup> Often, to demonstrate illegal redlining, plaintiffs must rely on statistical evidence of lending patterns.<sup>27</sup>

### 3. The Disparate Impact Standard and Perpetuation of Segregation

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<sup>20</sup> Fair Housing Act of 1968 § 804, 42 U.S.C. § 3604(a) (2013).

<sup>21</sup> Robert G. Schemm, *Housing Discrimination: Law and Litigation*, §13-3.

<sup>22</sup> *Id.*

<sup>23</sup> *U.S. v. Yonkers Bd. of Educ.*, 624 F.Supp 1276, 1291 n.9 (S.D.N.Y. 1985).

<sup>24</sup> 42 U.S.C. § 3605

<sup>25</sup> *Id.*

<sup>26</sup> 78 Fed. Reg. 11463 (“[V]iolations of various provisions may be established by proof of discriminatory effects, including . . . 3605.”).

<sup>27</sup> Robert G. Schemm, *Housing Discrimination: Law and Litigation*, §18:4.

FHA plaintiffs do not need to prove that defendants had intent to discriminate; they only need to demonstrate that a defendant's policies or actions created a discriminatory effect on a protected class. In this way, the FHA implicitly acknowledges that housing segregation is not merely the result of a conscious desire to exclude, but can also result from self-reinforcing trends in the unregulated market. This standard greatly expands the scope of the FHA's protections.

The discriminatory effect standard has been applied for over four decades and been affirmed by eleven federal circuit courts. Some minor variations remained in its application, however, and HUD finally codified a universal standard by issuing its new disparate impact rule in 2012.<sup>28</sup> The new rule states that "a practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons" or where it "creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."<sup>29</sup>

The latter provision codifies the long-standing judicial rule that "perpetuation of segregation" is a sufficient discriminatory effect to sustain a FHA claim. While most antidiscrimination fair housing rules are analogous to other civil rights legislation, the "perpetuation of segregation" claim is unique to the FHA. It exists because the FHA's drafters explicitly stated that the law is intended to promote integration. These pro-integrative aims have taken a central role in the law's implementation. For instance, HUD's commentary on the new rule states:

The Fair Housing Act's language prohibiting discrimination in housing is "broad and inclusive;" the purpose of its reach is to replace segregated neighborhoods with "truly integrated and balanced living patterns." . . . "[T]he intent of Congress in passing the Fair Housing Act was broad and inclusive, to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States."<sup>30</sup>

The new rule also takes care to ensure that its protections extend to government regulation and administration of housing development: it specifies that "[e]nacting or implementing land-use rules, ordinances, policies, or procedures that restrict or deny housing opportunities or otherwise make unavailable or deny dwellings to persons because of race, color, religion, sex, handicap, familial status, or national origin" is a disparate impact discrimination.<sup>31</sup>

In promulgating the new rule, HUD resisted efforts to curtail its applicability or clarify that it cannot be used to challenge segregative affordable housing construction in low-income neighborhoods. Several commenters asked HUD to specify in the final rule that the mere approval of LIHTC projects in minority areas alone does not establish a *prima facie* case of disparate impact under the Act, or, alternatively, that locating LIHTC projects in low-income

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<sup>28</sup> 24 C.F.R. § 100.500.

<sup>29</sup> *Id.*

<sup>30</sup> 78 Fed. Reg. 11461 (quoting *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 211 (1972) (internal citation omitted)).

<sup>31</sup> 24 C.F.R. § 100.70(d)(5).

areas is a legally sufficient justification to claims of disparate impact discrimination.<sup>32</sup> HUD refused, defending the flexible standard applied by the judiciary: “The rule does not mandate that affordable housing be located in neighborhoods with any particular characteristic, but requires, as the Fair Housing Act already does only that housing development activities not have an unjustified discriminatory effect.”<sup>33</sup> Another commenter requested that the final rule provide safe harbors for state and local programs that have legitimate policy and safety goals such as protecting water resources, promoting transit orientated development, and revitalizing communities.<sup>34</sup> HUD responded that “it does not believe that the suggested safe harbors or exemptions from discriminatory effects liability are appropriate or necessary.”<sup>35</sup> HUD’s comments confirm the continuing vitality of the FHA’s anti-segregative aims.

Case law demonstrates that the disparate impact rule can force the hand of government agencies that refuse to consider whether their activities perpetuate segregation or comport with the requirements of § 3604(a), even if their refusal takes the form of inaction.

The classic example of a § 3604(a) disparate impact violation is exclusionary zoning, in which a municipality refuses to allow housing that will be disproportionately occupied by a protected racial or social group. In *Huntington Branch NAACP v. Town of Huntington*, the city of Huntington refused to rezone a parcel to accommodate low income housing in the white part of the jurisdiction, allowing the continued concentration of affordable housing in the poorer, non-white part of the jurisdiction.<sup>36</sup> The Second Circuit found this failure to rezone to be a disparate impact violation that perpetuated segregation in violation of 42 U.S.C. § 3604.<sup>37</sup>

In recent years, affordable housing construction has become a considerably more complicated industry, with the government increasingly taking on the role of financier while leaving many project and siting decisions to private market developers. But this division of responsibilities does not alter or reduce the duty to prevent discriminatory effects: in the eyes of the FHA, sophisticated subsidies are just another form of public housing.

In *Inclusive Communities Project v. Texas Department of Community Affairs*, a federal court in Texas found a “perpetuation of segregation” disparate impact violation of 42 U.S.C. § 3604 when the state housing agency disproportionately awarded low income housing tax credits in minority neighborhoods.<sup>38</sup> The court made clear that the low income housing tax credit was no different from other forms of federally supported affordable housing for purposes of 42 U.S.C. § 3604. On appeal, the Fifth Circuit did not question the district court’s conclusion that the disproportionate allocation of funding to segregated neighborhoods constituted a discriminatory effect, and a prima facie violation of the FHA. Instead, it only instructed the

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<sup>32</sup> 78 Fed. Reg. 11476.

<sup>33</sup> *Id.*

<sup>34</sup> 78 Fed. Reg. 11477.

<sup>35</sup> *Id.*

<sup>36</sup> *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), *aff’d in part*, 488 U.S. 15 (1988).

<sup>37</sup> *Id.*

<sup>38</sup> *See Inclusive Communities Project, Inc. v. Tex. Dep’t of Cmty. Affairs*, 860 F. Supp. 2d 312 (N.D. Tex. 2012); *Inclusive Communities Project, Inc. v. Tex. Dep’t of Cmty. Affairs*, 749 F. Supp. 2d 486 (N.D. Tex. 2010).

lower court to harmonize its decision with the new HUD rule, which had been issued in the interim.<sup>39</sup>

It is worth noting that in the *ICP v. TDCA* case, Texas relied on a point system for allocating tax credits, in almost identical fashion to Minnesota. The district court discussed at length the state's failure to use its discretionary control over the point system to promote integration.<sup>40</sup> Minnesota uses an extremely similar point system; Minnesota's housing agency, however, has far greater discretionary control over the system than its Texan counterpart. Nonetheless, Minnesota too only makes token efforts to support integration.

#### 4. 42 U.S.C. § 3608

Governmental recipients of federal housing funds have an obligation under the Federal Fair Housing Act, 42 U.S.C. § 3608(d) to “affirmatively further” fair housing, which requires them to use their “immense leverage” to create “integrated and balanced living patterns.”<sup>41</sup>

In a recently proposed rule, designed to provide guidance for recipients of fair housing funding, HUD defines “[a]ffirmatively furthering fair housing” as “taking proactive steps beyond simply combating discrimination to foster more inclusive communities. Specifically, the proposed rule states that affirmatively furthering fair housing “means taking *steps to overcome segregated living patterns and support and promote integrated communities, to end racially and ethnically concentrated areas of poverty*, and to foster and maintain compliance with civil rights and fair housing laws.”<sup>42</sup>

The rule's commentary further notes:

[R]acially or ethnically concentrated areas of poverty are of particular concern because they couple fair housing issues with other significant local and regional policy challenges. These areas clearly fall in the domain of fair housing, as they often reflect legacies of segregated housing patterns. Of the nearly 3,800 census tracts in this country where more than 40 percent of the population is below the poverty line, about 3,000 (78 percent) are also predominantly minority. . . . *Consequently, interventions that result in reducing racially and ethnically concentrated areas of poverty hold the promise of providing benefits that assist both residents and their communities.*<sup>43</sup>

With HUD issuing new guidance on the issue, the outer limits of the obligation to affirmatively further fair housing have not yet been tested, and may still expand. Unquestionably, however, the provision requires affirmative steps above and beyond merely avoiding the

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<sup>39</sup> Inclusive Communities Project v. Tex. Dep't of Cmty. Affairs, --- F.3d ---- (5th Cir. 2014).

<sup>40</sup> *ICP v. TDHCA*, 860 F.Supp 2d at 7-10.

<sup>41</sup> *NAACP v. Sec'y of Hous. and Urban Dev.*, 817 F.2d 149, 156 (1st Cir. 1987) (Breyer, J., holding the Title VIII imposed a duty on HUD beyond simply refraining from discrimination) [hereinafter *NAACP v. Sec'y of HUD*].

<sup>42</sup> Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710-01 § 5.152 (emphasis added).

<sup>43</sup> *Id.* at 43713 (emphasis added).



activities proscribed by § 3604 and § 3605. Case law has illuminated some of these requirements.

First, and minimally, government agencies must analyze the impact of new housing on racial concentration. This obligation was most thoroughly discussed in the foundational case *Shannon v. HUD*, cited at length in the new HUD rule.<sup>44</sup> In *Shannon*, plaintiffs sought to block the construction of federally subsidized housing, arguing that it would create a discriminatory effect by inducing re-segregation of the neighborhood.<sup>45</sup> The federal court agreed, holding that adding affordable housing to racially segregated or re-segregating neighborhoods was *prima facie* a violation of the federal fair housing law, and that before doing so HUD and all grantees of federal housing funds must undertake a careful analysis of neighborhood demographics.

It is essential to recognize that, according to *Shannon* and its progeny, § 3608 does not merely prevent government agencies from building low-income housing in areas of minority concentration, which would already be unlawful under § 3604(a)'s perpetuation-of-segregation cause of action. It also obligates governments to *undertake the analysis* required to demonstrate that they are not creating segregation, *in advance of* the siting of low-income housing. In other words, while § 3604 disallows certain discriminatory outcomes, § 3608 places on public agencies an additional requirement that they use particular methods. In one notable case, HUD was found to have violated § 3608 for administering grants to the City of Boston without ensuring that the grants were not creating discriminatory effects – even though subsequent analysis showed that no discrimination was occurring.<sup>46</sup> Governments are not permitted to “fly blind”, so to speak, when it comes to housing.

*Shannon* and follow-up cases have demonstrated that while HUD and local agencies are due administrative deference in interpreting siting rules, they cannot arbitrarily assert that an area is not one of minority concentration or “racially mixed,” when census data show otherwise.<sup>47</sup> Further, the assertion by HUD or recipients of federal housing resources that there are comparable opportunities for non-whites outside of minority areas requires a factual showing of such comparable opportunities. All federal siting cases, even those in which HUD siting decisions are sustained against civil rights claims, uniformly require HUD and local agencies to assemble 1) current census data, 2) subsidized housing location data, and 3) racial tenancy occupancy data and to explicitly use these data to formally review all siting decisions involving federal funds. Such review cannot involve a post hoc justification of the siting decision, but must be concurrent with project planning and occur before the unit was constructed.<sup>48</sup>

*Shannon* also describes in detail a number of questions which should be answered in order to determine whether low-income housing is concentrating poverty. While the list is not exhaustive, it includes both qualitative and quantitative elements (e.g., an analysis the historic

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<sup>44</sup> *Id.* at 43712; *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970).

<sup>45</sup> *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970).

<sup>46</sup> *NAACP v. Sec’y of HUD*, 817 F.2d 149, 155 (1st Cir. 1987).

<sup>47</sup> *Glendale Neighborhood Association v. Greensboro Housing Authority*, 956 F. Supp. 1270 (M.D.N.C. 1996); *Project BASIC v. Kemp*, 776 F. Supp. 637 (D. R.I. 1991).

<sup>48</sup> *See Bus. Ass’n of Univ. City v. Landreiu*, 660 F.2d 867 (3d Cir. 1981); *Alshuler v. HUD*, 686 F.2d 472 (7th Cir. 1982).

political trends related to public housing in a region, and the projected racial composition of the units). The court takes a decidedly holistic view of housing policy, stating, for example, that public agencies should consider the effect of housing on school demographics.<sup>49</sup>

## 5. Affirmatively Furthering Fair Housing and HUD

The obligation for state and local governments receiving HUD funding to affirmatively further fair housing derives from two sources. First, they are directly subject to § 3608, as discussed above. However, in addition, HUD has, in its own efforts to comply with § 3608, itself imposed conditions upon grantees and funding recipients.

Local and state recipients of a number of HUD grants, including the Community Development Block Grant, the HOME Investment Program, and others, are required to certify that they are affirmatively furthering fair housing. In order to do so, HUD requires these entities to complete an Analysis of Impediments (AI). In its Fair Housing Planning Guide, the agency provides significant guidance on what must be included in an AI.

It is essential that state and local grantees comply with HUD's instructions regarding fair housing, because those that do not are placed at risk of losing housing funding. This is because the agency is required, by § 3608(e)(5) of the FHA, to administer its own programs in a way that affirmatively furthers fair housing. Even if HUD does not take such action itself, its hand may be forced by a private plaintiff; courts have upheld suits to compel the agency to eliminate funding when "it is aware of a grantee's discriminatory practices but has made no efforts to force it to comply with the Fair Housing Act by cutting off existing federal financial assistance."<sup>50</sup> This rule was first described in *Anderson v. City of Alpharetta*<sup>51</sup> and was later affirmed in the Sixth Circuit.<sup>52</sup> This standard can place many tens of millions of dollars in local funding at risk, even in cases where a local entity is not itself subject to lawsuit or discrimination claim.

## III. The Analysis of Impediments and the Public Sector

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<sup>49</sup> "We suggest that some considerations relevant to a proper determination by HUD include the following:

1. What procedures were used by the [local public agency (LPA)] in considering the effects on racial concentration when it made a choice of site or of type of housing?
2. What tenant selection methods will be employed with respect to the proposed project?
3. How has the LPA or the local governing body historically reacted to proposals for low income housing outside areas of racial concentration?
4. Where is low-income housing, both public and publicly assisted, now located in the geographic area of the LPA?
5. Where is middle income and luxury housing, in particular middle income and luxury housing with federal mortgage insurance guarantees, located in the geographic area of the LPA?
6. Are some low-income housing projects in the geographic area of the LPA occupied primarily by tenants of one race, and if so, where are they located?
7. What is the projected racial composition of tenants of the proposed project?
8. Will the project house school age children and if so what schools will they attend and what is the racial balance in those schools?" *Shannon*, 436 F.2d at 821-22.

<sup>50</sup> *Anderson v. City of Alpharetta*, Ga., 737 F.2d 1530, 1537 (11th Cir. 1984).

<sup>51</sup> *Id.*

<sup>52</sup> *Jaimes v. Toledo Metropolitan Housing Authority*, 758 F.2d 1086, 1208 (6th Cir. 1985).

As a component of its Fair Housing Act obligations, HUD requires grantees to certify that they are Affirmatively Furthering Fair Housing (AFFH). One key component of this certification is the Analysis of Impediments (AI), which documents existing impediments to fair housing, determines their relative severity, and explores remedies, as well as discussing other actions a grantee may have undertaken affirmatively further fair housing.

The AI is not a formulaic document; recognizing that there can be regional variations in impediments to housing choice, HUD allows jurisdictions some freedom to tailor their AIs to local circumstances. HUD does, however, provide significant guidance to the contents of the AI, in the form of the agency's Fair Housing Planning Guide.

The Guide makes clear that any complete AI should conduct a very searching analysis of “public activities, practices, and procedures involving housing and housing-related activities.”<sup>53</sup>

This component of the analysis can take many forms, but must be broad in scope and cannot restrict itself merely to the provision of affordable or subsidized housing. HUD states that “[c]larification of the distinction between AFFH actions and affordable housing activities is often necessary,” as “[t]he two concepts are not equivalent but they are also not entirely separate.” While housing choice requires some consideration of affordable housing, “undertak[ing] to build or rehabilitate housing for low- and moderate-income families . . . is not in and of itself sufficient to affirmatively further fair housing.”<sup>54</sup>

In order to help guide jurisdictions in their creation of an AI, the Guide includes a lengthy section describing facts or circumstances that might indicate a housing impediment or merit further investigation.<sup>55</sup> Public sector “actions or omissions” that affect fair housing choice include straightforward factors like housing or zoning codes, but also indirect government actions such as job creation efforts, patterns in the provision of services, and redevelopment activities. The Guide also places an emphasis on intra-governmental interactions – both horizontal, between different municipalities, and vertical, between agencies with overlapping authority.<sup>56</sup>

Special attention is given to issues surrounding site selection. The Guide is unambiguous on the subject: “[i]f fair housing objectives are to be achieved, the goal must be to avoid high concentrations of low-income housing.”<sup>57</sup> It also recognizes the considerable challenge of doing so: “many communities feel strongly that housing for [low-income, homeless, and disabled] persons should be provided but ‘not in my backyard.’”<sup>58</sup> Additionally, it identifies jurisdictional divisions as a major obstacle to providing less concentrated subsidized housing: “in metropolitan areas, serious consideration should be given to ways [communities] can participate in cooperative, interjurisdictional planning for construction of assisted housing.”<sup>59</sup>

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<sup>53</sup> FHPG at 2-9.

<sup>54</sup> *Id.* at 5-4.

<sup>55</sup> *Id.* at 5-1.

<sup>56</sup> *Id.* at 5-5.

<sup>57</sup> *Id.* at 5-6

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

The Guide suggests several specific questions to guide this inquiry. These include “Are there concentrations of low- and moderate-income housing in one more localities or neighborhoods within the jurisdiction’s geographic area?” and “Has the jurisdiction adopted policies and procedures that promote the placement of new or rehabilitated housing for lower-income households . . . in a wide spectrum of neighborhoods?”<sup>60</sup>

It is also suggested that an AI consider actual demographic trends among public housing occupants; for instance, whether “there [is] a pattern in or more assisted housing developments of concentration of tenants by race or ethnicity,” or if there is a “pattern, by location and family type, of minority and nonminority certificate and voucher holders who rent units under the Section 8 . . . voucher housing assistance program.”<sup>61</sup>

HUD’s Guide includes a number of “example” impediments, which demonstrate the type of public sector “actions or omissions” that should appear in an AI. These include the absence of an enforcement mechanism for correcting housing site selection disparities,<sup>62</sup> zoning ordinances in suburban communities that prevent construction of multifamily housing,<sup>63</sup> failure to support the local fair housing agencies,<sup>64</sup> and even apathy and status quo bias among political and community leaders.<sup>65</sup>

HUD also cautions that revitalization and other efforts to improve living conditions in areas of minority concentration, while often desirable, cannot alone provide fair housing choice. While these programs are “a significant part of a comprehensive approach to furthering fair housing for lower-income minorities, jurisdictions should not focus solely on linking such efforts.”<sup>66</sup> These programs must be accompanied by activities to “extend efforts to provide lower-income housing opportunities . . . to nonminority and more economically advantaged neighborhoods.”<sup>67</sup> Towards this end, the Guide suggests that an AI consider whether municipal services “are equally distributed throughout the geographic area of the jurisdiction.”<sup>68</sup>

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<sup>60</sup> *Id.* at 5-6, 5-7.

<sup>61</sup> *Id.* at 5-13, 5-14.

<sup>62</sup> “The State does not have an enforceable site selection policy for affordable housing that will compel its major cities to select sites for affordable housing located outside of minority or low-income areas or allocate such housing on a metropolitanwide basis.” *Id.* at 3-13.

<sup>63</sup> “The suburban jurisdictions of the State’s major cities have exclusionary zoning ordinances that preclude the construction of affordable multifamily housing and keep out lower-income and minority persons.” *Id.* at 3-11.

<sup>64</sup> “The local fair housing agencies are under-funded and ill-equipped to enforce their local fair housing ordinances.” *Id.* at 3-13.

<sup>65</sup> “The AI also documents the results of extensive interviews with all segments of the real estate community and community leaders of all races and ethnic groups; these interviews and surveys reveal that all parties concerned feel comfortable with the status quo of segregated housing patterns, racial hostility as it relates to housing issues, and the lack of any resolve to tackle these problems.” *Id.* at 3-12.

<sup>66</sup> *Id.* at 5-10.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 5-11.

## Appendix II: IMO Comments on FHEA First Draft

Ms. Libby Starling  
Director of Research  
Twin Cities Metropolitan Council

August 15, 2013

Re: Comment on Draft FHEA

Dear Ms. Starling:

I write to express my concern that the draft FHEA is inadequate. First, it improperly allows areas of concentrated poverty and racially integrated areas to be considered “areas of opportunity” for the FHEA. The draft fails to report on the drivers of segregation and to note significant impediments to fair housing choice. These impediments include the Twin Cities Metropolitan Council’s (Met Council or Council) abandonment of its effective fair housing policy, implemented from 1971 to 1983; the creation of a set of central city regional sub-allocators of the low-income housing tax credit that perpetuate and intensify racial segregation; a state qualified allocation plan and a sub-allocator qualified allocation plan that both perpetuate and intensify racial segregation; and the failure of the Met Council and other state agencies to cooperate to fulfill the state’s duties under the Fair Housing Act of 1968.

I. Areas of Concentrated Poverty (RCAP Areas) and Areas That are Already Integrated Cannot Be Considered Areas of Opportunity for Purposes of the FHEA.

A. HUD FHEA Official Guidance

HUD FHEA official guidance makes clear that 1) areas of concentrated poverty and segregation and 2) areas that are already racially integrated cannot be considered “areas of opportunity” for purposes of the FHEA.

In the Disparities in Access to Opportunity webinar on March 12, 2012, HUD clarified that areas of access to opportunity cannot involve “areas of concentrated poverty” (RCAP areas) or areas that “are already racially integrated.”<sup>1</sup> HUD Deputy Assistant Secretary for Enforcement Programs Sara Pratt stated: “[A]n opportunity area is not an area of concentrated poverty and in general are not areas that are already integrated.”<sup>2</sup>

<sup>1</sup> See Regional Fair Housing Equity Assessment: Disparities in Access to Opportunity, HUD (Mar. 12, 2012) (PowerPoint) (on file with the Institute on Metropolitan Opportunity).

<sup>2</sup> Transcript of Webinar at 16, Disparities in Access to Opportunity, University of Minnesota Law School (on file with the Institute on Metropolitan Opportunity).

Secretary Pratt continued:

In some situations, you have higher opportunity areas — that they may be higher opportunity areas, *but they already have disproportionate amounts of affordable housing and/or you may have higher opportunity areas that are already integrated. The research shows that those areas should be, generally speaking, avoided for the development of new affordable housing.* You already have disproportionate affordable housing in some higher opportunity area, or you're already integrated in that area. The risk is and the temptation is to put more affordable housing there, because the neighborhood's not going to give you any grief, right? *But the problem and the downside of this is that it tends to perpetuate segregation by increasing the percentages of African Americans or Hispanics or other groups now living in this population in this part of the community. And so for purposes of a Fair Housing Equity Assessment in general, you should be looking at areas beyond these areas, even though they are higher opportunity.*<sup>3</sup>

Secretary Pratt's statements are grounded in judicial interpretations of the Equal Protection Clause of the Federal Constitution, Title VI of the 1964 Civil Rights Act, and Sections 3604 and 3608 of the Fair Housing Act of 1968.

#### B. The Equal Protection Clause and 1964 Civil Rights Act

Title VI of the 1964 Civil Rights Act forbids federal government funding of racially segregated programs or activities. Under this provision and the Equal Protection Clause of the U.S. Constitution, civil rights proponents, including Martin Luther King, Jr., challenged the siting decisions of the Chicago Public Housing Authority and the United States Department of Housing and Urban Development. They argued that the disproportionate siting of low income housing in poor minority neighborhoods and the fact that such housing was occupied by segregated population of blacks in black neighborhoods and whites in white neighborhoods violated Title VI and the Equal Protection Clause of the Constitution.<sup>4</sup>

The court agreed and, as a remedy for this violation, said that only twenty-five percent of new low-income housing could be built in neighborhoods of minority concentration or neighborhoods with more than thirty percent non-white population.<sup>5</sup> The court picked this number because experts persuaded it that the thirty percent threshold was "a tipping point" because neighborhoods above that number most often re-segregated and became overwhelmingly black and poor. The court ordered that seventy-five percent of all new subsidized housing must be placed in neighborhoods at least one mile from neighborhoods that were thirty percent non-white or neighborhoods the court believed were not in the process of tipping. The court declared that tipping and re-segregation were some of the most important challenges facing American metropolitan areas, and that the remedy to segregative conduct could not be placing housing in areas already on the path to becoming segregated.<sup>6</sup>

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<sup>3</sup> Transcript of Webinar at 25 (emphasis added).

<sup>4</sup> See *Gautreaux v. Chi. Hous. Auth.*, 503 F.2d 930 (7th Cir. 1974) [hereinafter *Gautreaux I*].

<sup>5</sup> *Gautreaux v. Chi. Hous. Auth.*, 304 F. Supp. 736, 737–38 (N.D. Ill. 1969) [hereinafter *Gautreaux II*].

<sup>6</sup> *Gautreaux I*, 503 F.2d at 939.

### C. The Fair Housing Act of 1968

#### 1. 42 U.S.C. § 3604(a)

The Federal Fair Housing Act declares that it shall be unlawful to make unavailable or deny a dwelling to any person because of race, color, religion, sex, familial status or national origin.<sup>7</sup> The new disparate impact rule, 24 C.F.R. § 100.500, states that a “practice has a discriminatory effect where it actually *or predictably . . . perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.*”<sup>8</sup> The rule also provides that “[e]nacting or implementing land-use rules, ordinances, policies, or procedures that restrict or deny housing opportunities or otherwise make unavailable or deny dwellings to persons because of race, color, religion, sex, handicap, familial status, or national origin” is a disparate impact discrimination.<sup>9</sup>

At page 5, the rule’s commentary states:

The Fair Housing Act’s language prohibiting discrimination in housing is “broad and inclusive;” the purpose of its reach *is to replace segregated neighborhoods with “truly integrated and balanced living patterns.”* . . . “[T]he intent of Congress in passing the Fair Housing Act was broad and inclusive, to advance equal opportunity in housing and achieve racial integration for the benefit of all people in the United States.”

At page 26, the commentary states:

The legislative history of the Act informs HUD’s interpretation. The Fair Housing Act was enacted after a report by the National Advisory Commission on Civil Disorders, which President Johnson had convened in response to major riots taking place throughout the country, warned that “[o]ur nation is moving toward two societies, one black, one white—separate and unequal.”

The Act’s lead sponsor, Senator Walter Mondale, explained in the Senate debates that *the broad purpose of the Act was to replace segregated neighborhoods with “truly integrated and balanced living patterns.”*<sup>10</sup> Senator Mondale recognized that segregation was caused not only by “overt racial discrimination” but also by “[o]ld habits” which became “frozen rules,” and he pointed to one such facially neutral practice—the “refusal by suburbs and other communities to accept low-income housing.”<sup>11</sup> He further explained some of the ways in which federal, state, and local policies had formerly operated to require segregation and argued that “Congress should now pass a fair housing act to undo the effects of these past” discriminatory actions.<sup>12</sup>

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<sup>7</sup> Fair Housing Act of 1968 § 804, 42 U.S.C. § 3604(a) (2013).

<sup>8</sup> 24 C.F.R. § 100.500 (2013) (emphasis added).

<sup>9</sup> *Id.* § 100.70(d)(5).

<sup>10</sup> Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710-01 (proposed July 19, 2013), 2013 WL 3757272 (2013) (emphasis added).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (emphasis added).



The disparate impact rule cites two cases to help define conduct that perpetuates segregation in violation of 42 U.S.C. § 3604.

In *Inclusive Communities Project v. Texas Department of Community Affairs (ICP)* a federal court in Texas found a “perpetuation of segregation” disparate impact violation of 42 U.S.C. § 3604 when the state housing agency disproportionately awarded low income housing tax credits in minority neighborhoods.<sup>13</sup> The court made clear that the low income housing tax credit was no different from other forms of federally supported affordable housing for purposes of 42 U.S.C. § 3604.

In *Huntington Branch NAACP v. Town of Huntington*, the city of Huntington refused to rezone a parcel to accommodate low income housing in the white part of the jurisdiction, allowing the continued concentration of affordable housing in the poorer, non-white part of the jurisdiction.<sup>14</sup> The Second Circuit found this failure to rezone to be a disparate impact violation that perpetuated segregation in violation of 42 U.S.C. § 3604.<sup>15</sup>

It is critically important that the FHEA examine the state placement of tax credit units under the holding of *ICP*, the Met Council’s administration of its federal housing programs, the fair share requirements of the land use planning under the holding of *Huntington*, and the new disparate impact rule.

## 2. 42 U.S.C. § 3608(d)

Recipients of federal housing funds have an obligation under the Federal Fair Housing Act, 42 U.S.C. § 3608(d) to “affirmatively further” fair housing, which requires them to use their “immense leverage” to create “integrated and balanced living patterns.”<sup>16</sup>

Executive Order 12892 declares that 42 U.S.C. § 3608 subjects the Department of the Treasury and recipients of the low-income housing tax credit to the duty to affirmatively further fair housing.<sup>17</sup> Treasury is ordered to follow HUD’s leadership in enforcing this obligation and to promulgate rules pursuant to this duty. See § 4-401. That Treasury has not issued these rules does not change its duty, nor does it change the duty of recipients of tax credits to affirmatively further fair housing in the low income tax credit program.

In its proposed rule, HUD defines “[a]ffirmatively furthering fair housing” as “taking proactive steps beyond simply combating discrimination to foster more inclusive communities. Specifically, the proposed rule states that affirmatively furthering fair housing “means taking *steps to overcome segregated living patterns* and *support and promote integrated communities, to end racially and ethnically concentrated areas of poverty*, and to foster and maintain compliance with civil rights and fair housing laws.”<sup>18</sup>

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<sup>13</sup> See *Inclusive Communities Project, Inc. v. Tex. Dep’t of Cmty. Affairs*, 860 F. Supp. 2d 312 (N.D. Tex. 2012); *Inclusive Communities Project, Inc. v. Tex. Dept. of Cmty. Affairs*, 749 F. Supp. 2d 486 (N.D. Tex. 2010).

<sup>14</sup> *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), *aff’d in part*, 488 U.S. 15 (1988).

<sup>15</sup> *Id.*

<sup>16</sup> *NAACP v. Sec’y of Hous. and Urban Dev.*, 817 F.2d 149, 156 (1st Cir. 1987) (Breyer, J., holding the Title VIII imposed a duty on HUD beyond simply refraining from discrimination) [hereinafter *NAACP v. Sec’y of HUD*].

<sup>17</sup> 59 Fed. Reg. 2939 (proposed Jan. 17, 1994), 1994 WL 16189201 (1994).

<sup>18</sup> *Affirmatively Furthering Fair Housing*, 78 Fed. Reg. 43710-01 § 5.152 (emphasis added).

“[T]he rule seeks to ...foster the diversity and strength of communities and regions by *improving integrated living patterns* and *overcoming historic patterns of segregation, reducing racial and ethnic concentrations of poverty*, and responding to identified disproportionate housing needs of persons protected by the Fair Housing Act.<sup>19</sup>

In further support of the obligation to reduce and eliminate RCAPs, the proposed rule notes:

The United States Supreme Court, in one of the first Fair Housing Act cases it decided, referenced the Act's co-sponsor, Senator Walter F. Mondale, in noting that “*the reach of the proposed law was to replace the ghettos ‘by truly integrated and balanced living patterns.’*”... The Act recognized that “where a family lives, where it is allowed to live, is inextricably bound up with better education, better jobs, economic motivation, and good living conditions.”<sup>20</sup>

The rule’s commentary further notes:

[R]acially or ethnically concentrated areas of poverty are of particular concern because they couple fair housing issues with other significant local and regional policy challenges. These areas clearly fall in the domain of fair housing, as they often reflect legacies of segregated housing patterns. Of the nearly 3,800 census tracts in this country where more than 40 percent of the population is below the poverty line, about 3,000 (78 percent) are also predominantly minority. Racially or ethnically concentrated areas of poverty merit special attention because the costs they impose extend far beyond their residents, who suffer due to their limited access to high-quality educational opportunities, stable employment, and other prospects for economic success. Because of their high levels of unemployment, capital disinvestment, and other stressors, these neighborhoods often experience a range of negative outcomes such as exposure to poverty, heightened levels of crime, negative environmental health hazards, low educational attainment, and other challenges that require extra attention and resources from the larger communities of which they are a part. *Consequently, interventions that result in reducing racially and ethnically concentrated areas of poverty hold the promise of providing benefits that assist both residents and their communities.*<sup>21</sup>

“The proposed rule reinforces the proposition that a critical component of addressing segregation is providing support for those communities that are integrated or are integrating. Strategies and actions to promote the effective and long-term viability of these communities is an important component of these fair housing goals.”

The proposed rule uses *Shannon v. HUD* and *Otero v. NY City Housing Authority* to define the meaning of affirmatively furthering fair housing.<sup>22</sup>

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<sup>19</sup> 78 Fed. Reg. at 43711 (emphasis added).

<sup>20</sup> *Id.* at 43712 (emphasis added).

<sup>21</sup> *Id.* at 43713 (emphasis added).

<sup>22</sup> *Id.* at 43712.

### 3. *Shannon v. HUD*

In *Shannon*, a black and white residents of a racially integrated Philadelphia neighborhood brought suit against HUD to enjoin the construction of a federal subsidized housing project.<sup>23</sup> They argued that given the predictable racial composition of the tenants of such housing, the project would likely tip or re-segregate the neighborhood. The federal court agreed arguing that adding affordable housing to racially segregated or re-segregating neighborhoods was prima facie a violation of the federal fair housing law and that before doing so HUD and all grantees of federal housing funds must undertake a careful analysis of neighborhood demographics in order to satisfy itself that it would not deepen segregation or hasten re-segregation.

*Shannon* holds:

Possibly before 1964 the administrators of the federal housing programs could, by concentrating on land use controls, building code enforcement, and physical conditions of buildings, remain blind to the very real effect that racial concentration has had in the development of urban blight. Today such color blindness is impermissible. Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy.<sup>24</sup>

We suggest that some considerations relevant to a proper determination by HUD include the following:

1. What procedures were used by the LPA in considering the effects on racial concentration when it made a choice of site or of type of housing?
2. What tenant selection methods will be employed with respect to the proposed project?
3. How has the LPA or the local governing body historically reacted to proposals for low income housing outside areas of racial concentration?
4. Where is low-income housing, both public and publicly assisted, now located in the geographic area of the LPA?
5. Where is middle income and luxury housing, in particular middle income and luxury housing with federal mortgage insurance guarantees, located in the geographic area of the LPA?
6. Are some low-income housing projects in the geographic area of the LPA occupied primarily by tenants of one race, and if so, where are they located?
7. What is the projected racial composition of tenants of the proposed project?

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<sup>23</sup> *Shannon v. United States Dep't of Hous. and Urban Dev.*, 436 F.2d 809 (3d Cir. 1970).

<sup>24</sup> *Id.* at 820–21.

8. Will the project house school age children and if so what schools will they attend and what is the racial balance in those schools?<sup>25</sup>

*Shannon's* progeny include *Glendale Neighborhood Association v. Greensboro Housing Authority* and *Project BASIC v. Kemp*.<sup>26</sup> These cases demonstrate that while HUD and local agencies are due administrative deference interpreting siting rules, they cannot arbitrarily assert that an area is not one of minority concentration or "racially mixed," when census data show otherwise. Further, the assertion by HUD or recipients of federal housing resources that there are comparable opportunities for non-whites outside of minority areas requires a factual showing of such comparable opportunities. All federal siting cases, even those in which HUD siting decisions are sustained against civil rights claims, uniformly require HUD and local agencies to assemble 1) current census data, 2) subsidized housing location data, and 3) racial tenancy occupancy data and to explicitly use these data to formally review all siting decisions involving federal funds. Such review cannot involve a post hoc justification of the siting decision, but must be concurrent with project planning and occur before the unit was constructed.<sup>27</sup>

The FHEA must note the MHFA is not collecting or sharing racial data on the tenancy of low-income housing tax credit units. This is a per se violation of 42 U.S.C. § 3608 as construed by *Shannon* and its progeny.

According to *Shannon*, housing placement in segregated neighborhoods was allowed if there was an overriding need that could not otherwise be met. This overriding need, however, could not be caused by racial discrimination.

#### 4. *Otero v. New York City Housing Authority*

In *Otero v. New York City Housing Authority*, in order to keep a large public housing project racially integrated, whites were temporarily given preference for units.<sup>28</sup> When the project became more than fifty percent white, blacks were given the same preference. In *Otero*, the court declared that society's interest in integration trumped even a claim of individual discrimination.

*Otero* held:

To allow housing officials to make decisions having the long range effect of increasing or maintaining racially segregated housing patterns merely because minority groups will gain an immediate benefit would render such persons willing, and perhaps unwitting, partners in the trend toward ghettoization of our urban centers. . . . Congress' desire in providing fair housing throughout the United States was to stem the spread of urban ghettos and to promote open, integrated housing, even though the effect in some instances might be to prevent some members of a racial minority from residing in

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<sup>25</sup> *Shannon*, 436 F.2d at 821–22.

<sup>26</sup> 956 F. Supp. 1270 (M.D.N.C. 1996); 776 F. Supp. 637 (D. R.I. 1991).

<sup>27</sup> *See* *Bus. Ass'n of Univ. City v. Landreiu*, 660 F.2d 867 (3d Cir. 1981); *Alshuler v. HUD*, 686 F.2d 472 (7th Cir. 1982).

<sup>28</sup> *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122 (1973).

publicly assisted housing in a particular location. The affirmative duty to consider the impact of publicly assisted housing programs on racial concentration and to act affirmatively to promote the policy of fair, integrated housing is not to be put aside whenever racial minorities are willing to accept segregated housing. The purpose of racial integration is to benefit the community as a whole, not just certain of its members. In the absence of a history of deliberate discrimination against non-white persons, which would necessitate undoing the harmful effects, that objective cannot be achieved by adoption of a double standard under which low cost housing would be available to poor whites rather than to poor non-whites, or vice versa.<sup>29</sup>

Some local preservation advocates inaccurately claim *Otero* was overruled by *United States v. Starrett City Associates*, which struck down a poorly planned, rigid racial quota scheme in a New York housing project.<sup>30</sup> However, *Starrett City* makes it clear that it does not overrule *Otero* but rather *reaffirms* its central holding concerning the overriding importance of integration.<sup>31</sup> Moreover, the *Starrett* court suggested that it would have upheld the integration plan at bar were it based on a more data-driven, narrowly tailored effort.<sup>32</sup>

##### 5. Regulatory Codifications of *Gautreaux*, *Shannon*, *Otero*, and *ICP*

In response to *Gautreaux*, *Shannon*, *Otero*, and *ICP*, HUD has promulgated siting regulations for construction of new public housing, Section 8 new construction, senior housing,<sup>33</sup> and for the low income housing tax credit housing.<sup>34</sup> The regulations set out various requirements for sites, crucially prohibiting new construction in “an area of minority concentration.”<sup>35</sup> In addition, the regulation prohibited the siting of projects in neighborhoods of high poverty concentration,<sup>36</sup> re-segregating neighborhoods,<sup>37</sup> neighborhoods detrimental to family life,<sup>38</sup> those with urban blight,<sup>39</sup> and those without access to basic, decent public facilities and services, meaning the site must have access to social and recreational, educational, commercial and health facilities that are at least equivalent to those found in neighborhoods consisting or largely unassisted housing.<sup>40</sup>

The regulation sets out two exceptions to the general prohibition on locating public housing in areas of minority concentration. Housing can be sited in areas of minority concentration if there are 1)

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<sup>29</sup> *Otero*, 484 F.2d at 1134.

<sup>30</sup> *United States v. Starrett City Assoc.*, 840 F.2d 1096 (2d Cir 1988).

<sup>31</sup> *Id.* at 1102.

<sup>32</sup> *Id.* at 1105.

<sup>33</sup> Michael Vernarelli, *Where Should HUD Locate Assisted Housing?: The Evolution of Fair Housing Policy*, in HOUSING DESEGREGATION AND FEDERAL POLICY 214–23 (John Goering ed., 1986); 24 C.F.R. § 941.202, 24 C.F.R. § 880.206. *See* *Bus. Ass’n of Univ. City v. Landrieu*, 660 F.2d 867, 869 (3d Cir. 1981) (discussing HUD regulations as partially in response to *Shannon*).

<sup>34</sup> *See* 78 Fed. Reg. 11460-01 at 43741–42.

<sup>35</sup> 24 C.F.R. § 941.202(c)(1)(i) (2013); 880.206; 891.125.

<sup>36</sup> *Id.* § 941.202(d) (“The site must . . . avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.”); 880.206.

<sup>37</sup> *Id.* § 941.202(c)(ii) (prohibiting siting in “[a] racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area”); 880.206.

<sup>38</sup> *Id.* § 941.202(e); 880.206.

<sup>39</sup> *Id.* (prohibiting siting where “substandard dwellings or other undesirable elements predominate” and stating that siting in such areas is acceptable only if there is a “concerted program to remedy the undesirable conditions”).

<sup>40</sup> *Id.* § 941.202(g); 880.206.

“sufficient, comparable opportunities . . . outside areas of minority concentration” or 2) “the project is necessary to meet overriding housing needs which cannot otherwise feasibly be met in that housing market area.”<sup>41</sup> Echoing *Gautreaux*, the regulations explicitly recognize that discriminatory resistance—presumably by white suburbanites—is not a sufficient reason for focusing on low-income neighborhoods.<sup>42</sup> Similar to the *Shannon* court, the regulations also hedged their bets by including language that discussed sufficient comparable choices and overriding needs.<sup>43</sup>

While federal regulations were very clear that these site and neighborhoods standards applied to public housing and Section 8 new constructions. HUD made clear that they applied to the low-income housing tax credit in its recent final disparate impact rule. Several commenters asked HUD to specify in the final rule that the mere approval of LIHTC projects in minority areas alone does not establish a *prima facie* case of disparate impact under the Act or that locating LIHTC projects in low-income areas is a legally sufficient justification to claims of disparate impact discrimination. HUD responded that “the rule does not establish a new form of liability, but instead serves to formalize by regulation a standard that has been applied by HUD and the courts for decades, while providing nationwide uniformity of application. The rule does not mandate that affordable housing be located in neighborhoods with any particular characteristic, but requires, as the Fair Housing Act already does only that housing development activities not have an unjustified discriminatory effect.”

Another commenter requested that the final rule provide safe harbors for state and local programs that have legitimate policy and safety goals such as protecting water resources, promoting transit orientated development, and revitalizing communities. HUD responded that “it does not believe that the suggested safe harbors or exemptions from discriminatory effects liability are appropriate or necessary.”

## II. The Draft FHEA Fails to Undertake Much of the Analysis Required by Law.

The FHEA is modeled on the Analysis of Impediments to Fair Housing Choice (AI). As such, the Fair Housing Planning Guide (FHPG)<sup>44</sup> describes how an AI and FHEA should be undertaken. The draft FHEA ignores much of fair housing analysis outlined in the FHPG.

The proposed Affirmatively Furthering Fair Housing (AFFH) rule states:

Under the proposed rule, program participants will use HUD data to evaluate patterns of integration and segregation, racial and ethnic concentration of poverty, and disparities in access to valuable community assets and disproportionate housing needs based on protected class and evaluate the primary determinants of these conditions. ***Program participants will also assess whether laws, policies, or practices limit fair housing***

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<sup>41</sup> 24 C.F.R. § 941.202(c)(1)(i) (2013).

<sup>42</sup> *Id.* (noting that the “overriding need” exception cannot be threat of racial discrimination).

<sup>43</sup> *Id.*

<sup>44</sup> HUD, Fair Housing Planning Guide, vol.1 (1993), *available at* <http://www.hud.gov/offices/fheo/images/fhpg.pdf>. The Fair Housing Planning Guide is “firmly rooted in the statutory and regulatory framework and consistent with the case law” and is “entitled to respect.” *See United States ex rel. Anti-Discrimination Ctr v. Westchester Cnty.*, 495 F. Supp. 2d 375, 387–88 (S.D.N.Y. 2007).

*choice, as well as the role of public investments in creating, perpetuating, or alleviating the segregation patterns revealed by the assessment.* Examples of such laws, policies, or practices include, but are not limited to, zoning, land use, financing, infrastructure planning, and transportation.<sup>45</sup>

HUD official FHEA policy program guidance states:

As the regional planning grantee cooperative agreement indicates, all grantee must conduct “activities pertaining to a regional analysis of impediments.” Fulfilling the requirement of the FHEA satisfies this obligation.<sup>46</sup>

HUD guidance further notes that the “FHEA is quite similar to the regional AI in scope and content.”<sup>47</sup> “The key take away is there are a finite set of places where the FHEA and regional AI are different.”<sup>48</sup> The major differences between the FHEA and regional AI are 1) the FHEA does not cover familial status and disability discrimination;<sup>49</sup> the FHEA, unlike the AI, must assess physical infrastructure and housing transportation linkage; and that “the strategies and option plan” required in the AI is optional in the FHEA.<sup>50</sup>

The Fair Housing Planning Guide is “firmly rooted in the statutory and regulatory framework [of the Fair Housing Act] and consistent with the case law” and is “entitled to respect” in evaluating an AI.<sup>51</sup> FHEA program guidance states that the FHPG “provides helpful information” and “[a]pproaching the FHEA in the manner described in the fair housing planning guide will provide jurisdictions with a comprehensive picture of the status of fair housing at the local and state levels.”<sup>52</sup>

The FHPG defines the FHEA as a “review of impediments to fair housing choice in the public and private sector.” The FHEA involves:

1. A comprehensive review of State or Entitlement jurisdiction’s laws, regulations, and administrative policies, procedures, and practices
2. An assessment of how those laws, etc. affect the location, availability, and accessibility of housing
3. An assessment of the conditions both public and private affecting fair housing choice for all protected classes

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<sup>45</sup> 78 Fed. Reg. 43710-01 at 43715. (emphasis added).

<sup>46</sup> HUD, Program Policy Guidance OSHC 2012-03 (Feb. 17, 2012) (FHEA Guidance), *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=OSHC2012-03FHEAss.pdf/>.

<sup>47</sup> HUD, Regional Fair Housing and Equity Assessment, *available at* [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/sustainable\\_housing\\_communities/regional\\_fairhsg\\_equityassesmt/](http://portal.hud.gov/hudportal/HUD?src=/program_offices/sustainable_housing_communities/regional_fairhsg_equityassesmt/).

<sup>48</sup> HUD, The FHEA Compared to the Regional FHEA, *available at* [http://portal.hud.gov/hudportal/documents/huddoc?id=FHEA\\_vs\\_Regional\\_FHEA.pdf/](http://portal.hud.gov/hudportal/documents/huddoc?id=FHEA_vs_Regional_FHEA.pdf/).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *United States ex rel. Anti-Discrimination Ctr. v. Westchester Cnty.*, 495 F. Supp. 2d 375, 387-88 (S.D.N.Y. 2007).

<sup>52</sup> *Id.*

4. An assessment of the availability of affordable and accessible housing in a range of unit sizes<sup>53</sup>

The FHPG defines “impediments to fair housing choice” as:

Any actions, omissions, or decisions taken because of race, color ... or national origin which restrict housing choices or the availability of housing choices

Any actions, omissions, or decisions which have the effect of restricting housing choices or the availability of housing choices on the basis of race, color...national origin.<sup>54</sup>

Policies, practices, or procedures that appear neutral on their face, but which operate to deny or adversely affect the availability of housing to persons because of race, ethnicity, disability and families with children may constitute such impediments. Impediments to fair housing choice include actions or omissions in the state or entitlement jurisdictions that:

1. Constitute violations, or potential violations, of the Fair Housing Act
2. Are counterproductive to fair housing choice such as:
  - A. Community resistance when minorities, persons with disabilities and/or low income persons first move into the white and or moderate to high income areas
  - B. Community resistance to the siting of housing facilities for persons with disabilities because of the persons who occupy the housing
3. Have the effect of restricting housing opportunities on the basis of race, color...national origin.<sup>55</sup>

The FHPG requires analysis of the following data items:

- Public policies, practices, and procedures involving housing and housing related activities
- Zoning and land use policies, tax assessment abatement practices.
- The nature and extent of fair housing complaints/suits or other data that may evidence a state or entitlement jurisdictions achievement of fair housing choice
- Demographic patterns
- Home mortgage disclosure act (HMDA data)
- Results of testing
- Results of fair housing initiative FHIP grants
- Patterns of occupancy in Section 8, public and assisted housing, and private rental housing

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<sup>53</sup> HUD, *supra* note 47, § 2.3.

<sup>54</sup> HUD, *supra* note 47, § 2.7.

<sup>55</sup> HUD, *supra* note 47, § 2-17.



The FHPG states that “[d]ata source include HUD and other agency data bases and studies; State and local sources, private housing industry reports, and college and *university studies*.”<sup>56</sup>

The FHPG requires the establishment of procedures that “accommodate diverse views and interests” and that provide for a conflict resolution and decision making in the event that initial conflicts cannot be resolved.”<sup>57</sup> “The FHEA structure should provide for effective, ongoing relationships with *all* elements of the community with clear and continuous exchange of concerns, ideas, analysis and evaluation of results.”<sup>58</sup>

Finally, HUD strongly encourages states in entitlement jurisdictions to become familiar with all studies that apply to their community and region as a first step in planning, and FHEA jurisdictions should not waste efforts re-studying and re-analyzing problems for which good information already exists. Instead, they need to plan and carry out actions to address the problems.<sup>59</sup>

#### A. The FHEA Fails to Document How the Placement of Subsidized Housing Has Acted as a Driver of Segregation in the Region

Recent analysis by the Institute Metropolitan Opportunity of U.S. Department of Housing and Urban Development data shows that in 2010, forty-five percent of LIHTC units and twenty-five percent of all housing units are located in the region’s central cities.<sup>60</sup> In the suburbs, eighty percent of LIHTC units were in white or integrated area. In the central cities, eighty-six percent of the units were in neighborhoods with more than thirty percent minority households and virtually all of the units were in areas with predominantly non-white, high poverty, low performing schools. Regionally, half of all LIHTC units were in predominately non-white elementary school attendance areas, while only twenty-three percent of elementary students attended these schools.<sup>61</sup>

There are also major disparities in the racial mix of LIHTC households between the central cities and suburbs. According to recently released data on 2011 MHFA-administered LIHTC, tenants in the central cities are much more likely to live in developments that are predominately minority than in the suburbs. In the central cities, eighty-six percent of householders lived in places (by census tract) that were more than fifty percent minority, and in the suburbs sixty-nine percent of householders lived in projects (by census tract) that were more than fifty percent white.<sup>62</sup>

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<sup>56</sup> HUD, *supra* note 47, § 2.4, 2–9.

<sup>57</sup> HUD, *supra* note 47, § 2.5, 2–2.

<sup>58</sup> HUD, *supra* note 47, § 2.5, 2–12.

<sup>59</sup> HUD, *supra* note 47, § 2.7, 2–18.

<sup>60</sup> Data from 2010 U.S. Department Housing and Urban Development LIHTC database, *available at* <http://www.huduser.org/portal/datasets/lihtc.html> from Minnesota project extract for projects placed through 2010. The percent of housing units were calculated by IMO from 2010 U.S. Census SF1 data.

<sup>61</sup> *Id.* Calculation of housing and students by 2012 school attendance area by IMO of Minnesota Department of Education data.

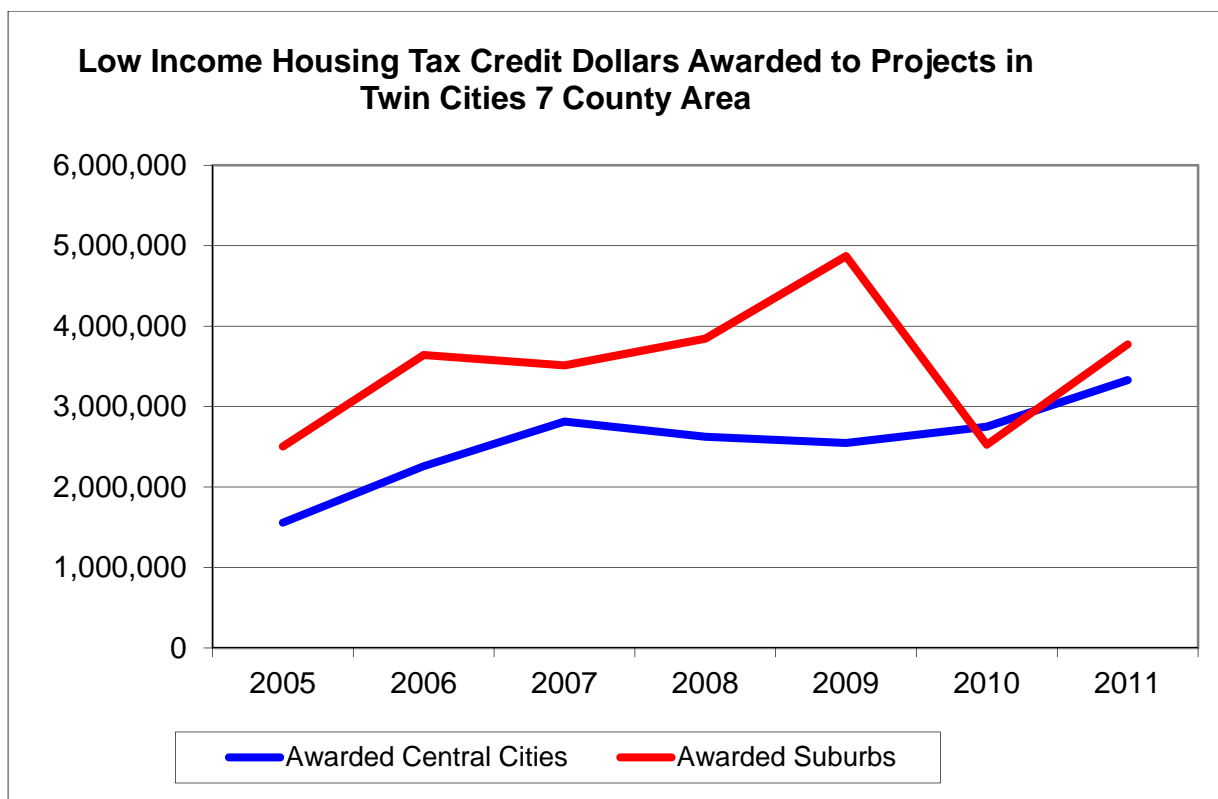
<sup>62</sup> Minnesota Housing data on counts of low income housing tax credits (LIHTC) by census tract does not provide the full universe for the racial characteristics of tenants by excluding data on projects that were administered solely by non-MHFA sub allocators and by not reporting the full range of minority percentages for tracts with LIHTC households under twenty-five percent minority as well as for tracts seventy-five percent or more minority. As a result, we are unable we are unable to fully determine how integrative the LIHTC program has been overall in the Twin Cities.

IMO analysis of tax credit allocation data from MHFA's annual publication of "Housing Tax Credit Awards and Applicants" shows that the percentage of LIHTC awards going to suburbs, measured in dollars, hovered near sixty percent from 2005 to 2009, dropping to fifty percent in 2010 and 2011. (See chart below.) Thus the central cities with only a quarter of the region's population and deeply racially segregated schools received roughly fifty percent of the tax credit units and recent tax credit funding during the period. In addition, between 2005 and 2011, \$10 million of funding resulted in about 1200 of new LIHTC units in the central cities, often in segregated neighborhoods. At the same time, the state rejected about \$32 million worth of requests from suburban areas more likely to have higher achieving and more integrated schools.

The most recent data for 2012 show that HUD-administered subsidized housing units (not including LIHTC) in the seven-county area are still disproportionately concentrated in the central cities of Minneapolis and Saint Paul. Subsidized units occupied by minority households are also disproportionately located in the central cities. The following map shows that census tracts with greater numbers of subsidized units (larger circles) and higher percentages of racial minorities (redder circles) are mainly located in the central cities.<sup>63</sup> The two central cities contain 56.5 percent of the region's subsidized units, compared to only 24.6 percent of all housing units. The central cities also have a much higher percentage of minority headed households in subsidized units than the suburbs. Seventy-five percent of subsidized units in the central cities in 2012 were headed by people of color, compared to only forty-two percent in the suburbs.

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<sup>63</sup> The data include all HUD-administered subsidized housing, but not low income housing tax credits, which guidelines are set by the Internal Revenue Service.



Subsidized units are also disproportionately placed within the FHEA opportunity areas. Green areas (located almost entirely in the central cities) contain forty-five percent of the region's subsidized housing, but only fifteen percent of the region's overall housing. Yellow areas (located in the central cities and many inner suburbs) contain thirty-two percent of the region's subsidized housing and twenty-nine percent of the region's housing. In contrast, the blue areas (the remaining area within the Metropolitan Urban Services Area) have only twenty-two percent of the region's subsidized housing, compared to fifty percent of the region's housing. There are also disproportionate percentages of minority householders in subsidized housing in the FHEA opportunity areas. In green areas seventy-seven percent of subsidized householders are occupied by minority households, followed by fifty-five percent in the yellow areas and thirty-seven percent in the blue areas.

Finally, subsidized housing units in the suburbs since 1986 continue to be located primarily in areas with schools which are predominantly non-white or that are re-segregating. The map below shows the attendance boundaries of elementary schools in the region, divided into three categories – predominantly white (schools with non-white shares between zero and thirty percent), integrated (non-white shares between thirty and fifty percent), and predominantly non-white (non-white shares greater than fifty percent).

Combining the 2012 HousingLink data on all subsidized housing except vouchers with school attendance areas shows that fifty-nine percent of all subsidized housing units in the region were inside the red areas on the maps where nearly all schools were predominantly non-white. Only sixteen percent were in the non-shaded area where schools were predominantly white. This part of the region, of

course, where educational opportunities are strongest, crime is lowest, environmental and health conditions are strongest, and where jobs are growing most quickly.

This pattern is very similar when compared to neighborhood characteristics (rather than schools). Subsidized units are disproportionately in neighborhoods with high minority concentrations. In 2012, fifty-six percent of subsidized units (including LIHTC and Section 8 project units) were in census tracts with more than thirty percent minority residents, more than twice the percentage of the region's population living in those tracts.

A simulation by IRP of the potential effects of the placement of subsidized units in 2005 showed that more proactive placement of existing LIHTC units in attendance areas for low poverty schools could have significantly increased school integration at that time.<sup>64</sup> For instance, if LIHTC and project-based Section 8 units had been assigned *randomly* by race and located across the region in the same proportions as overall population, then the region could have been brought nearly a third of the way to the goal of integrated schools in 2005.<sup>65</sup> It is thus conceivable that pro-integrative placement of new units in low poverty school attendance areas could do most of the work necessary for a racially integrated regional school system.<sup>66</sup> Indeed, in the long run, if housing policy returns to the more pro-integrative strategies of earlier decades it may be possible to have integrated schools with less pro-integrative busing than exists today.

Overall, as many central city schools have collapsed under segregation and poverty, the central cities have been allocated much more than their regional fair share of subsidized housing. Subsidized units have been placed disproportionately in neighborhoods with schools that are predominately poor and non-white, have failing test scores and that are growing worse and more isolated from college or middle-income jobs.

Action Steps:

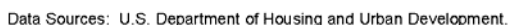
- Return by the Met Council to setting strong fair share goals and monitoring of segregative behavior in suburban areas.
- Provide full race data on LIHTC: HUD does not report on, and Minnesota Housing does not provide the full universe for the racial characteristics of tenants in LIHTC units. As a result, it is impossible to determine how integrative the LIHTC program has been. The lack of collection and availability of race data in LIHTC by U.S. public housing agencies is troubling. It is hard to see how housing agencies can follow their obligation to affirmatively further fair housing if they do not collect data on the race of tenants in LIHTC units.

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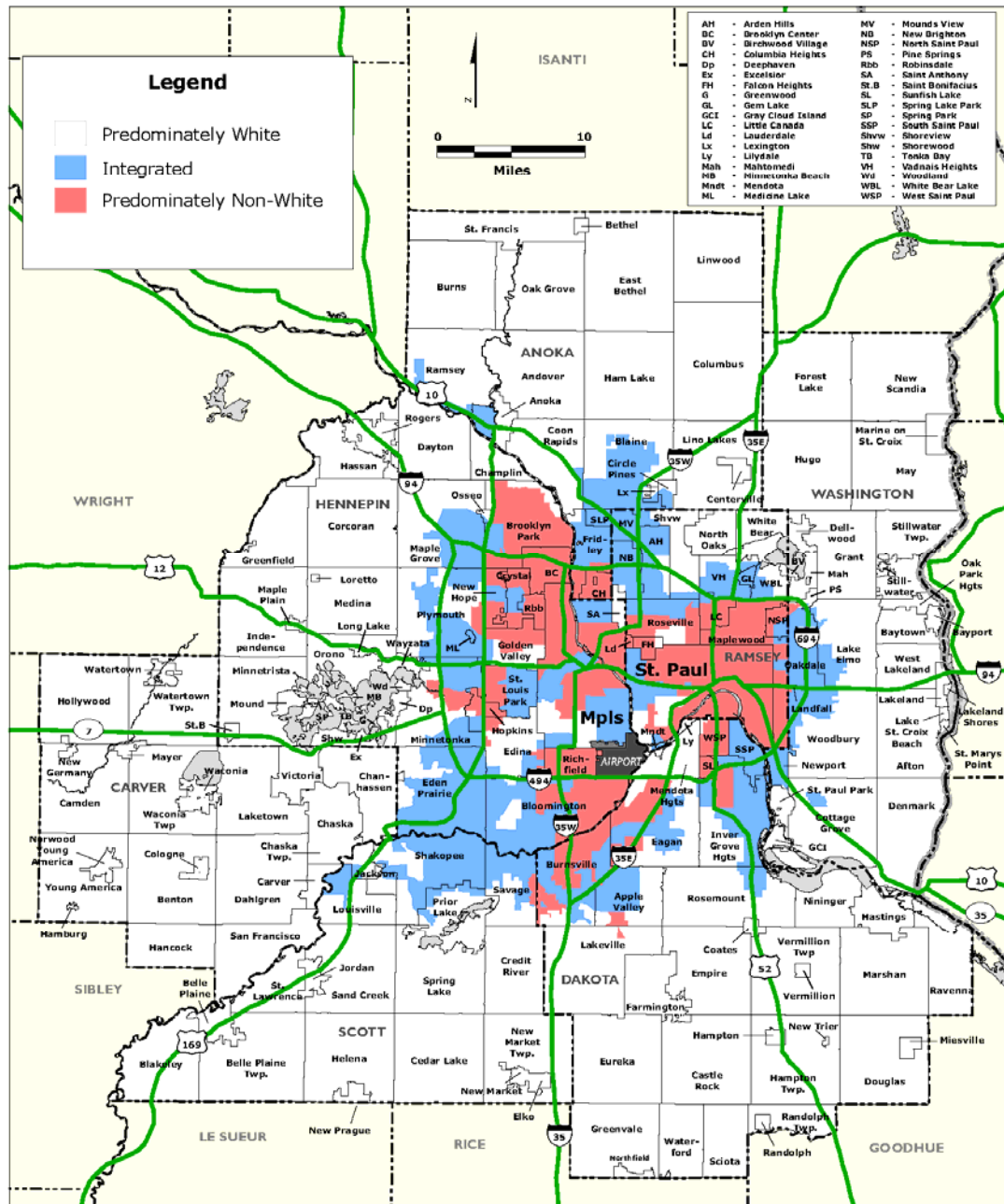
<sup>64</sup> See Institute on Race and Poverty, A Comprehensive Strategy to Integrate Twin Cities Schools and Neighborhoods 38, available at <http://www.irpumn.org/>.

<sup>65</sup> *Id.* at 39.

<sup>66</sup> If a random placement of units does half the work, a pro-integrative placement of all of the units by logical deduction could do even more.



# MINNEAPOLIS - SAINT PAUL REGION Racial Composition of Public Elementary Schools by School Attendance Areas, 2012-2013



Data Sources: U.S. Census Bureau, Minnesota Housing Finance Agency.

B. The FHEA Fails to Collect and Report Data Required by HUD Regarding Racial Discrimination and Racial Segregation.

The FHEA does not analyze the racial occupancy of the low-income housing tax credit program. Sections 42 U.S.C. § 3608 (e)(6) and 3608(a) both require HUD to collect and make available to the public on an annual basis the racial occupancy data for potential beneficiaries of programs administered by the HUD, including but not limited to the CDBG and HOME program. This would include any unit with any HUD funds involved in its construction in any way. Section 42 U.S.C. §1437z-8 requires each state housing finance agency to collect data on the racial occupancy of the tax credit program. I requested this information formally in June 2012 and have not received it. Recently, Minnesota Housing stated that they would make this available only after the completion of the FHEA, and only for a fee of \$2000, an onerous fee to a citizen or small research organization. It is likely that Minnesota Housing has never collected this data and thus never fulfilled its legal obligation under both 42 U.S.C. §1437z-8 and *Shannon*. It requiring us to fund what is its clear legal duty to provide to the public. It is impossible for the Met Council or any state agency to affirmatively further fair housing if it is intentionally blind to racially occupancy patterns of subsidized housing. *Shannon* and its progeny requires recipient of federal housing funds to collect and analyze racial occupancy data before they make housing placement decisions.

C. The FHEA Fails in Its Obligation to Identify the Most Significant Impediments to Fair Housing Choice.

The draft FHEA should have included “a comprehensive review of a State or Entitlement jurisdiction’s laws, regulations, and administrative policies, procedures and practices,” and “an assessment of how those laws, etc. affect the location, availability, and accessibility of housing.”<sup>67</sup> By failing to mention several of the most important state agencies and local governments with duties and powers to affirmatively further fair housing, the FHEA prima facie fails in this obligation.

1. The FHEA fails to report on the abandonment of Met Council Policy 13/39, one of the nation’s most effective and pro-integrative regional fair housing systems, in favor of an uncoordinated series of racially segregative programs.

From 1970 to 1986, the Met Council, together with the state housing finance agency, implemented a regional fair share housing program through coordination of its land use and housing policies.<sup>68</sup> In direct response to the passage of the Federal Fair Housing Act and the promulgation of its siting rules, the first school desegregation lawsuit against the state of Minnesota,<sup>69</sup> and the New Jersey

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<sup>67</sup> HUD, *supra* note 47, § 2.3, 2–7 (defining the FHEA).

<sup>68</sup> The Twin Cities’ fair share program during this period was “one of the highest-performing regional programs in the entire nation.” Edward G. Goetz, Karen Chapple & Barbara Lukermann, *The Rise and Fall of Fair Share Housing: Lessons from the Twin Cities*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 251 (Xavier de Souza Briggs ed., 2005). For evidence of the success of the program during the 1970s, see Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 *FORDHAM URB. L.J.* 877, 919–20 (2006).

<sup>69</sup> See *Booker v. Minneapolis Sch. Dist. No. 1*, 351 F. Supp. 799 (D. Minn. 1972) (regarding a federal equal protection boundary violation).



Supreme Court's decision in *Mount Laurel*,<sup>70</sup> the Met Council (pursuant to its statutory and constitutional duty to achieve a fair share distribution of affordable housing) and the Minnesota Housing Finance Agency (now Minnesota Housing) created and operated the most effective suburban affordable housing plan with the greatest pro-integrative civil rights effect in the nation's history.<sup>71</sup> This program, known as Policy 13/39, operated under both the fair share requirement of the Minnesota Land Use Planning Act and federal A-95 review power with clear guidance from HUD.<sup>72</sup> Both state and federal law provided an independent statutory basis to support the program. Through Housing Policy 13 (later renumbered Policy 39), the Met Council used its authority and the withholding of a wide variety of federal and state funds to encourage affordable housing development in the suburbs.<sup>73</sup>

#### a. History of Fair Share and Policy 13/39

On the heels of the New York Court of Appeal's decision in *Golden v. Town of Ramapo*, it became clear that the type of staged urban growth system the Met Council sought to establish would be legally defensible.<sup>74</sup> The Council hired the renowned land use scholar, Robert Freilich, who drafted the *Ramapo* system to design a new Metropolitan Land Use Planning Act (Act) for submission to the Minnesota Legislature. From the outset it was clear the Act would contain a "fair share" housing requirement, for Freilich believed that the staged growth system the Council wanted would be unconstitutional without it. In January of 1974, Freilich produced a report to the Met Council outlining the proposed act and its fair share provisions.<sup>75</sup>

Just as riots throughout the country in the late 1960s lead to the Kerner Commission Report and ultimately to the passage of the Fair Housing Act, serious civil disturbances in North Minneapolis and the growing racial segregation in both central cities school systems were driving forces behind the Met Council's fair share housing policy. The Met Council was also influenced by the progress of the *Booker*<sup>76</sup> school desegregation lawsuit, which many, including the its chair, Al Hofstede, believed could not be effectively carried out within the borders of the city of Minneapolis alone.<sup>77</sup> Hofstede and the Met Council believed that racial segregation was destroying the education and economic prospects of black citizens in North Minneapolis, the fabric and vitality of their neighborhoods and that growing

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<sup>70</sup> S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713 (N.J. 1975) [hereinafter *Mount Laurel*].

<sup>71</sup> See Robert H. Freilich & John W. Ragsdale, Jr., *Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region*, 58 MINN. L. REV. 1009 (1974) (Freilich and Ragsdale drafted the Metropolitan Land Use Planning Act, which was revolutionary for its time.).

<sup>72</sup> See 24 C.F.R. § 941.202 (2013); Orfield, *supra* note 68, at 920.

<sup>73</sup> Orfield, *supra* note 68.

<sup>74</sup> *Golden v. Town of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291 (1972).

<sup>75</sup> See Robert H. Freilich and John W. Ragsdale, Jr., *A Legal Study of the Control of Urban Sprawl in the Minneapolis-St. Paul Metropolitan Region*, submitted to the Twin Cities Metropolitan Council (January 10, 1974) [hereinafter *Freilich Legal Study*]. The report was later published in the Minnesota Law Review with the following note, "This article is the result of a 1971-73 grant from the Met Council to Professor Freilich to study and recommend a legal policy for regional growth in accordance with the council's decision to pursue growth in a timed and sequential manner." See Freilich and Ragsdale, *Timing and Sequential Controls – The Essential Basis for Effective Regional Planning: An Analysis for the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region*, 58 MINN. L. REV. 1009 (1974) n.1.

<sup>76</sup> *Booker v. Special Sch. Dist. No. 1*, 351 F. Supp. 799 (D. Minn. 1972).

<sup>77</sup> Interview Albert Hofstede (Dec. 19, 2012).



racial and social segregation would hurt the economic vitality of the metropolitan area.<sup>78</sup> The Met Council's goals were also shaped by the *Gautreaux* case<sup>79</sup> in Chicago, the *Shannon* case<sup>80</sup> in Philadelphia and the *Mount Laurel* case<sup>81</sup> in New Jersey. It appeared that federal courts under the new Fair Housing Act were going to encourage housing authorities to change the practice of concentrating most low-income housing in poor minority neighborhoods and that exclusionary zoning practices would be found to exceed the delegated police powers of growing suburban communities. Prior the passage of the Land Use Planning Act, the Met Council had begun to push fair sharing housing allocations in cooperation with the state housing finance agency.

Freilich grounded his "fair share" proposals in explicit goals already annunciated by the Metropolitan Council,<sup>82</sup> the requirements of the Federal Fair Housing Act, and the evolving case prohibiting exclusionary zoning. The "fair share" requirement embodied in the Metropolitan Land Use Planning Act (LUPA) was intended to represent a legal "term of art" clarified by court decisions rather than a vague open-ended term subject to a broad range of council interpretations.

In its guiding documents, prior to LUPA the Met Council had declared that its fair share system was intended to reduce racial and economic segregation, eliminate exclusionary zoning, and to use the its affirmative powers to increase regional racial and economic integration for the benefits of individuals, neighborhoods and in order to strengthen the region's workforce and economic vitality.

The Met Council's "Development Framework Objectives" declare "[t]he principal reason for a physical development plan is to improve the quality of life enjoyed by all Metropolitan residents." Its objective included providing "actual choice for a variety of opportunities for living, working and social interaction throughout the Metropolitan area for persons of all income, racial, and age groups" and prohibited the "forced concentrations of minority in lower income families and individuals in the older portions of the Metropolitan area."<sup>83</sup> In its "Central city and Older Suburban Areas Development Policy" the Met Council's goals include "[r]educ[ing] forced concentration of minorities in low-income persons."<sup>84</sup>

The LUPA directs the Met Council to plan for the "orderly and economic development" of the region. In its planning documents the Council states: "[t]he orderly and economic development of the Metropolitan area" "will be supported by actions to reduce forced concentration on minorities in low income persons," by providing "new housing in renewal neighborhoods fitting the density and type preferences of the population at large rather than emphasizing low income housing" and by providing "housing development opportunities for lower income persons in developed and new development areas."<sup>85</sup>

The Council defined the "Social Objectives of Physical Planning," to include:

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<sup>78</sup> Interview Albert Hofstede (Dec. 19, 2012).

<sup>79</sup> *Gautreaux I*, 503 F.2d 930 (7th Cir. 1974).

<sup>80</sup> *Shannon*, 436 F.2d 809 (3d Cir. 1970).

<sup>81</sup> *Mount Laurel*, 336 A.2d 713 (N.J. 1975).

<sup>82</sup> Freilich Legal Study at 67.

<sup>83</sup> Discussion Statement on Metropolitan Development Policy, Oct. 1973, at 7 [hereinafter Discussion Statement].

<sup>84</sup> *Id.* at 39.

<sup>85</sup> *Id.* at 14.

1. To increase choice and opportunity for persons in the Metropolitan area, particularly people who are in some way disadvantaged such as low income, minorities, senior citizens, etc.
2. To decrease residential segregation by race, class and income level. To reduce the concentration of lower income families and individuals in the lower in the older areas of the region and increase housing choice for lower income persons throughout the area.
3. To revitalize the two central cities and attract middle and upper income families and individuals to center cities.
4. To work toward an area which provides a more complete array of needed services and facilities to its residents. For example to increase the provision of social services in suburban areas so that the lack of such services does not reduce residential choice.<sup>86</sup>

Freilich began his recommendation by noting the demographic trends to which the Met Council must respond in implementing fair share.

With the population in the central cities becoming increasingly poor and nonwhite, the industry has left its workforce behind requiring extensive commutation and energy drains. The provision of low moderate income housing in the suburbs is now in a set necessity to avoid further concentrations in blight in the urban core and adequate job link housing at the fringe. At the same time the Council desires to upgrade inner-city areas and stabilize older transitional areas in the central cities in first ring suburbs.<sup>87</sup>

Freilich makes clear that the Met Council's housing goals were also its clear legal obligations, both under the Fair Housing Act and in order avoid exclusionary zoning. Citing *Gautreaux* and *Shannon* explicitly, Freilich writes "[u]nder recent decisions of the federal courts, interpreting the civil rights and housing law, housing cannot be built in the central cities if it results in the undue concentration of low income and minority persons."<sup>88</sup> Citing the *Mount Laurel* case, Freilich warns that state courts are "beginning to enforce mandatory affirmative plans for housing in suburban communities."<sup>89</sup>

In defining the legal concept of "fair share" Freilich references not only the *Mount Laurel* doctrine, but similar fair share definitions developed by the Delaware Valley Regional Planning

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<sup>86</sup> Discussion Statement at 7.

<sup>87</sup> Freilich Legal Study at 68.

<sup>88</sup> Freilich Legal Study at VI n.2 cited *Shannon*, 436 F.2d 809; *Lakewood Homes Inc. v. City of Lima*, 258 N. E.2d 470 (Ohio 1970); *Gautreaux II*, 304 F. Supp. 736; *El Cortez Heights Ass'n v. Tucson Hous. Auth.*, 457 P.2d 294 (Ariz. 1969).

<sup>89</sup> Freilich Legal Study at VI n.22 cited *Mount Laurel*, 119 N.J. Super 164, 290 A.2d 465 (1972). Before the passage of the land use planning act, the Mount Laurel doctrine was further elucidated by the New Jersey Supreme Court in *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975) (*Mount Laurel I*) and subsequently further clarified in *Southern Burlington County. NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d. 390 (1983) (*Mount Laurel II*).

Commission (DVRPC) and the Montgomery County fair share housing initiative in the Dayton, Ohio Metropolitan area. In so doing, Freilich makes clear that the “fair share requirement” in the land use planning is a well-defined, pro-integrative, and inclusionary housing strategy in which all regional communities would undertake similar, predictable responsibilities to house their ‘fair share’ of the region’s low-income households.<sup>90</sup>

Freilich concludes by making clear that without a substantive fair share provision in the land use planning act, the Met Council’s staged development system would be declared unconstitutional.<sup>91</sup> The legal mind behind the *Ramapo* decision wrote that a staged urban growth system would be challenged as an unconstitutional taking and/or a substantive due process and equal protection violation and, as such, would be subject to a strict scrutiny analysis. Without making explicit provision for the poor in all region communities, he did not think that a staged growth system would survive a strict scrutiny challenge.

b. The *Mount Laurel* doctrine informs the meaning of “Fair Share” under the Minnesota Land Use Planning Act

The *Mount Laurel* case is one the most important state constitutional decisions in American history. A typical law student will study *Mount Laurel* in property, in land use law, and state and local government law, and constitutional law. Whenever question of the meaning of “fair share” arises, whether to delineate the meaning of a statutory or regulatory phrase or to fill out another states’ constitutional obligations, courts virtually always follow “the *Mount Laurel* doctrine.”<sup>92</sup>

The *Mount Laurel* court notes:

The effective development of a region should not and cannot be made to depend upon the adventitious location of municipal boundaries, often prescribed decades or even centuries ago, and based in many instances of considerations of geography, or of politics that are no longer significant with respect to zoning. The direction of growth of residential areas on the one hand and of industrial concentration on the other refuses to

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<sup>90</sup> For the influence of *Mount Laurel* on the evolving concept of regional general welfare see generally *Associated Home Builders v. City of Livermore*, 135 Cal. Rptr. 41, 557 P.2d 473 (1976); *Britton v. Town of Chester*, 595 A.2d 492 (N.H. 1991); *Boothroyd v. Zoning Board of Appeals of Amherst*, 868 N.E.2d 83 (Mass. 2007); *Homebuilders Ass’n of N. Cal. v. City of Napa*, 90 Cal. App. 4 188, 108 Cal. Rptr. 2d 60, cert. denied, 535 U.S. 954 (2002).

<sup>91</sup> Freilich wrote: “Whatever the methods used in less the region utilizes extensive provisions for low moderate income housing, there is a grave danger that a regional planning system of growth control a regional planning in general will be subject to a strict scrutiny staff tested declared unconstitutional is violating equal protection of the laws.” Freilich Legal Study at 69 and n.28. Freilich notes that the *Ramapo* court used a strict scrutiny test on the staged development system the Met Council sought to emulate.

<sup>92</sup> In Oregon for example, the Oregon Land Use Development Commission uses *Mount Laurel* explicitly to define the meaning for the housing obligation of the Oregon land use law and the law has been followed very clearly and effectively. See *Seaman v. City of Durham*, 1 LCDC 283, 288 (1978); see also, Robert Liberty, *Abolishing Exclusionary Zoning: A Natural Policy Alliance for Environmentalists and Affordable Housing Advocates*, 30 B.C. ENVTL. AFF. L. REV. 581, 592 (2003); Liberty, *1998 Planned Growth: The Oregon Model*, 13 Natural Res. and Env’t. 315 (1998). Moreover, New York, Massachusetts, Pennsylvania, New Hampshire and many others follow *Mount Laurel*. See, e.g., *Bereson v. Town of New Castle*, 463 N.Y.S. 2d 832 (1983); *Nat’l Land and Inv. Co. v Kohn*, 215 A.2d 597 (Pa. 1965). In all nineteen states that have growth management laws, *Mount Laurel* jurisprudence shapes the application of these laws.

be governed by such artificial lines. Changes in methods of transportation have served only to accentuate the unreality in dealing with zoning problems on the basis of territorial limits.<sup>93</sup>

Based on this, the *Mount Laurel* doctrines hold that every community in a metropolitan area has a constitutional obligation to provide for its “fair share” of the region’s “existing and projected” need for affordable housing. It must do this through its zoning code, development agreements and development practices. If these practices do not themselves provide for the community’s fair share of affordable housing, the community must take affirmative measure such as inclusionary zoning to accomplish its obligations. Such a community moreover cannot generally deny a reasonable proposal by another level of government or private developer that would help them accomplish such a goal. *Mount Laurel* provides that if a community does not adapt its land use planning to achieve its fair share goals and if it shows a pattern of denying other levels of government or private developers proposals that would achieve these goals, then builders proposing projects that would help the community achieve its goal would have a constitutional “builder’s remedy,” an automatic zoning variance to proceed, and the city would have no power to impede their progress. The city would only regain such authority when a court or appropriately constituted agency had certified that the city was in compliance with its constitutional obligation.

*Mount Laurel* goals are allocated on a regional basis. In general each community must provide for its fair share of affordable housing, although the doctrine allows the court to give higher goals to suburbs with more entry level jobs and or greater “local fiscal capacity” than communities that are simply bedroom communities without jobs and with modest local tax resources. *Mount Laurel* makes clear that it does not wish to concentrate more affordable housing in communities that are poor and or declining. *Mount Laurel* also makes clear that if a community has its fair share of affordable housing, it can and sometimes should resume otherwise exclusionary practices until they threaten its ability to meet its responsibilities as a part of metropolitan region.

*Mount Laurel* is based on legal principle that zoning and land use regulation is a state power that can only be delegated to a city to undertake valid police powers that advance the health, safety and welfare of the state’s residents. A zoning provision or other development activity that prevents a local government from housing its fair share of the region’s poor exceeds the authority that could be delegated by the state. Such exclusionary behavior is without legal authority and also contrary to the general welfare of the state’s citizens.

*Mount Laurel* explicit rejects the argument that local fiscal zoning—or the preferential treatment of expensive housing and commercial industrial property and the exclusion of affordable housing—is necessary to keep local taxes low and services strong. Such fiscal zoning, the court declares, while perhaps a rational response to the preferences of local voters is impermissible justification for communities without their fair share of affordable housing.

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<sup>93</sup> *Mount Laurel*, 336 A.2d at 727.

It is all but certain that the Minnesota Supreme Court would follow *Mount Laurel*. Shortly after Freilich's report was released, the Minnesota Supreme Court in *Burnsville v. Onishuk* sustained the Fiscal Disparities Act, after it was declared unconstitutional under the General and Uniform Clause of the state constitution in a lower court.<sup>94</sup> The uniformity clause requires that "taxes shall be uniform upon the same classes or property and shall be levied and collected for public purposes."<sup>95</sup> In enacting fiscal disparities the legislature forced local communities to share the growth in their commercial and industrial property tax with other regional communities. In creating this system the legislature failed to create a regional taxing district and thus required local government to levy taxes on their property for the benefit of other jurisdictions at rates that were not uniform. Such efforts had always been voided by the Minnesota courts and famously disallowed in the neighboring state of Wisconsin in the leading case of *Buse v. Smith* in which a state wide school property tax sharing system was declared unconstitutional under Wisconsin's very similar Uniformity Clause.<sup>96</sup>

Echoing *Mount Laurel's* rationale, the *Onishuk* court reversed the trial court holding that the interdependence of the cities and suburbs of the Twin Cities metropolitan areas was so fundamental that they could no longer be treated as separate local governments for purposes of the state constitution's Uniformity Clause.

The *Onishuk* court noted:

[W]e are quick to concede that a strict application of our prior decisions would require us to lead strongly for affirmance. The trial court cannot be faulted for reading those decisions as it did. Nevertheless, we are today dealing with a viable, fluid, transient society where traditional concepts of what confers a tax benefit may be too parochial.... The seven County Metropolitan area, it is pointed out, *has a high degree of mobility and political, social, and economic interdependence*. There is an increasing use of facilities and one municipality by those who reside or work in a different municipality. The payment of taxes in a Metropolitan area may have only slight relationship to the use and enjoyment which residents make of other areas in the district. Defendants argue effectively that the indiscriminate encouragement of commerce and industry in a particular municipality may detrimentally and irretrievably affect the policies and plans for the development of parks and open space and *frustrate well considered housing policies for both low income and moderate income residents*. The fiscal disparities acts recognizes that's to some extent the location of commercial industrial development may be irrelevant to the question of the cost of services which are added to a municipality's budget occasioned by the location of such a development within its boundaries...

In other words, in terms of traditional balancing of benefits and burdens, the burdens conferred on the residents of a particular municipality because of the location of commercial industrial development within its boundaries may far exceed the burdens imposed on that municipality by virtue of the additional cost of servicing and policing the particular development which has located there. It is the theory of the fiscal

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<sup>94</sup> Village of Burnsville v. Onischuk, 301 Minn. 137, 222 N.W.2d 523 (1974).

<sup>95</sup> *Id.* at 143-44.

<sup>96</sup> Buse v. Smith, 74 Wis.2d 550, 247 N.W.2d 141 (Wis. 1976).

disparities act of the residents of highly developed commercial industrial areas do enjoy direct benefits from the existence of adjacent municipalities which provide open space, lakes, parks, golf courses, zoos, fairgrounds, low-density housing areas, churches school, schools and hospitals.<sup>97</sup>

Given the Court's holding that the interdependence of local government no long allows local municipalities to be considered independent government for purposes of the uniformity clause in part because a contrary result could frustrate "well considered housing policies for low and moderate residents" and the Minnesota Supreme Court's clear decisions limiting the zoning powers to those embodies in clearly defined police powers,<sup>98</sup> both Freilich and the Met Council believed the *Mount Laurel* doctrine was already a part of the Minnesota Constitution and that fair share requirement of the land use planning act simply reflected constitutional requirements.

*Mount Laurel* and *Onishuk* are similar cases. Both are about the interdependence of cities with land use planning powers with a single region. Both recognized the observing the local interest leads communities to compete for high valued tax uses and exclude affordable housing. Both see this trend as harmful to the citizen on their respective metropolitan areas.

Following the logic and holding of *Mount Laurel*, Freilich notes "Growth controls alone, however not sufficiently lower land housing will cost to make it feasible for private enterprise to construct low moderate income housing without a subsidy. Moreover with the recent moratorium on federal housing subsidy programs and impoundment of funds, the Council will have to affirmatively implement programs it has already conceptualized for housing stimulus."<sup>99</sup> Such affirmative measures were defined by Freilich to include the development of inclusionary zoning for exclusive communities and stable neighborhood integration plans for communities in the process of re-segregation.<sup>100</sup>

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<sup>97</sup> *Onishuk*, 301 Minn. at 153–4, 222 N.W.2d at 532–33.

<sup>98</sup> See *Gunderson v. Anderson*, 190 Minn. 245, 251 N.W. 515 (1933); *American Wood Products v. Minneapolis*, 21 F.2d 440 (D. Minn. 1927).

<sup>99</sup> Some of these program should be:

1. A-95 review of housing subsidy applications to ensure that projects are located in areas of new development.
2. Development and implementation of regional "fair share" plans for housing of low and moderate income families in suburban and new development locations
3. Development of regional housing authorities with capacity to develop public and turnkey housing throughout the region.
4. Develop, through legislation, powers to finance and construct low moderate income housing through sale of tax-exempt bonds, with an exemption from local zoning and planning
5. Request regional planning authority to review local zoning and planning to assure that it conforms with regional plans, is non-exclusionary and makes provision for low moderate income housing

There is no reason why the region could not request local and state revenue sharing to finance housing allowances or rent supplements, seed money or other programs to encourage low moderate income housing construction.

<sup>100</sup> According the report such stable integration plans included: 1) Construction of new towns in town for areas of blight beyond renewal and rehabilitation; 2) Judicious use of code enforcement to maintain flexible standards to prevent further abandonment; 3) Adoption of ordinances on sale signs, preventing blockbusting, and occupancy permits and 4) Utilization of benevolent quotas and insurance for property owners prevent panic selling to remain to maintain racially integrated neighborhoods.

In *Alliance for Metropolitan Stability v. Metropolitan Council*, advocates sued the Met Council to enforce the “fair share” requirement of the land use planning act.<sup>101</sup> The court held that while the advocates had standing, there was no private right of action under the land use planning act. In dicta, the court declared that the Met Council had the authority to determine fair share goals in the present manner. This discussion, however, was not part of the court’s holding and not necessary for its conclusion. Further in *Alliance*, the court was not presented with historical evidence that the framers both believed that *Mount Laurel* principles were already part of the Minnesota Constitution and their consequent desire for *Mount Laurel* jurisprudence to control the meaning of the “fair share” requirement. The court did not have the opportunity to distinguish *Burnsville v. Onishuk*.

Alternatively, this dicta would support the power that the Met Council, being the state administrative agency charged with enforcing the land use planning act to determine the meaning of the “fair share” requirement. Given that the Met Council had enforced a *Mount Laurel*-like standard without objection for over 15 years, the court’s dicta in *Alliance* would support the council in doing so again.

### c. The Metropolitan Land Use Planning Act (LUPA)

The text of LUPA follows precisely from Freilich’s recommendations and its preamble incorporates *Onishuk*’s constitutional principle of fundamental urban and suburban interdependence of Twin Cities communities.

Under Legislative Findings and Purpose, Minn. Stat. § 473.851

The legislature *finds and declares* that the local government units within the Metropolitan area are *interdependent*, that the growth and patterns of urbanization within the area creates the need for additional state, metropolitan and local public services and facilities ...Since problems of urbanization and development *transcend local governmental boundaries*, there is a need for the adoption of coordinated plans, programs and controls by all local government units *and school districts* in order to protect the health, safety and welfare of the residents of the Metropolitan area and to ensure coordinated, **orderly and economic development**. Therefore it is the purpose of section 462.355, subdivision 4, 473.175, and 473.851 to 473.871 to (1) establish requirements and procedures to accomplish comprehensive local planning with land use controls consistent with planned, **orderly and staged development** and the Metropolitan systems plans, and (2) to provide assistance to local governmental units *and school districts* within the Metropolitan area for the preparation of plans and official controls appropriate for their areas consistent with Metropolitan systems plans.<sup>102</sup>

LUPA requires a comprehensive planning approach to metropolitan housing issues and requires individual communities to establish programs that meet their fair share of the regional need for low-moderate housing. The Met Council is responsible for interpreting and implementing the requirements of LUPA. As noted above, Council made clear that “orderly and economic development of the

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<sup>101</sup> *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905 (Minn. App. 2003).

<sup>102</sup> MINN. STAT. § 473.851 (2012) (emphasis added).

Metropolitan area will be supported by actions to: “reduce forced concentration on minorities in low income persons; provide new housing in renewal neighborhoods fitting the density and type preferences of the population at large rather than emphasizing low income housing; and provide housing development opportunities for lower income persons in developed and new development areas.”

In terms of fair share, the statute specifically requires that community comprehensive plans:

[...] include a housing element containing standards, plans and programs for providing adequate housing opportunities *to meet existing and projected local and regional housing needs*, including but not limited to the use of official controls and land use planning to promote the availability of land for the development of low and moderate income housing.<sup>103</sup>

LUPA also requires that comprehensive plans include official land use controls “to implement the housing element of the land use plan, which will provide sufficient existing and new housing to meet the local unit's share of the metro area need for low and moderate income housing.” The language of meeting its share of the existing and projected need for affordable housing tracks the *Mount Laurel* doctrine precisely. It is clear beyond peradventure that the legislature intended to embody the well-accepted legal definition of fair share.

The statute also requires that each comprehensive plan include an implementation program describing “public programs, fiscal devices and other specific actions to be undertaken in stated sequence to implement the comprehensive plan....” The implementation program must include:

A housing implementation program, including official controls to implement the housing element of the land use plan, which *will* provide sufficient existing and new housing to meet the local unit's share of the metropolitan area need for low and moderate income housing.<sup>104</sup>

These provisions have been virtually ignored by many jurisdictions and by the Met Council for decades. In the late 1970s, the Council had an allocation plan setting numerical goals for low- and moderate-income housing for each metro area community. The Council also adopted “Advisory Standards for Land Use Regulation to Promote Housing Diversity in the Twin Cities Metropolitan Area.” The standards included those for land use regulations impacting housing costs such as lot size and garage requirements. It included land use policies promoting affordable housing. The standards were abandoned in the next decade, despite the statutory requirement that the Council provide “model plan provisions and official controls.”<sup>105</sup>

#### d. Implementation of LUPA and Fair Share

In his evaluation of the effectiveness of LUPA's fair share requirements, Professor Edward Goetz divided the Met Council's history of its three years of enforcement three waves.

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<sup>103</sup> *Id.* § 473.859(2).

<sup>104</sup> *Id.* § 473.859(4) (emphasis added).

<sup>105</sup> MINN. STAT. § 473.867(1) (2012).



## First Wave: A Racially Integrated Regional Fair Share Housing Policy 1971-1983

When LUPA was adopted by the state legislature in 1976, Met Council revised the pre-existing sector-based allocation plan to provide specific numerical goals for all communities within the MUSA line and for “free-standing growth centers” outside the MUSA line. The new allocation plan accounted for the number and projected growth of households and jobs, as well as the number of non-subsidized low- to moderate-income housing units for each community.<sup>106</sup> These goals were allocated as fair share goals with a methodology identical to that required by *Mount Laurel*, DVRPC and Montgomery County and as outlined by Freilich’s report.

Taking the affirmative steps recommended by Freilich and required by the *Mount Laurel* doctrine, the Met Council also influenced housing policy when it included housing performance evaluations as a part of its review of local government grant applications during the 1970s. In 1971, the Met Council started to review local governments’ funding applications to the federal government for park, sewer, water, and road facilities. During this process, Met Council explicitly considered the local government’s performance on affordable housing issues when making its recommendations to the federal government. The Met Council received direct authority to review these grant applications in 1973, which gave it even more leverage over local governments.

Following the *Mount Laurel* doctrine, in 1977, the Met Council adopted a set of development guidelines aimed, in part, at producing more affordable housing opportunities. These guidelines included suggestions related to lot size, garages, living area square footage, and other items that have a direct impact on housing prices. In addition, the development guidelines established standards for land-use policies that promoted lower-cost housing and gave communities a sense of best practices.

Goetz identified land that had been set aside for high density residential uses in the first wave of comprehensive plans in twenty-five sample communities and found over 7463 parcels (8590 acres) of land set aside as high density affordable housing in the first wave plans.<sup>107</sup> With this set of tools, Met Council was able to change the spatial distribution of subsidized housing in the region. For example, in 1971, Minneapolis and St. Paul had ninety percent of the region’s subsidized housing. Fifteen years later, their share was down to sixty percent.

The regional distribution of subsidized housing changed dramatically during the 1970s. At the beginning of the decade, roughly two-thirds (sixty-four percent) of new subsidized units were being located in the central cities. But by 1979, more than two-thirds (sixty-nine percent) were going to suburban locations. As a result, the total (cumulative) share of subsidized housing that was in the suburbs quadrupled, from ten percent to thirty-nine percent. This represents a nearly eight-fold increase in the total number of units in the suburbs from 1878 in 1971 to 14,712 in 1979. Over 13,000 units

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<sup>106</sup> The Allocation Plan, first created in 1972 (prior to passage of LUPA), was a formula-based system that provided numerical goals for low-mod housing in the region. Initially, these goals were not broken down for individual communities; instead, they were aggregated for nine separate subsectors of the metropolitan area.

<sup>107</sup> Goetz, Edward G., Karen Chapple and Barbara Lukermann, *The Minnesota Land Use Planning Act and the Promotion of Low- and Moderate-Income Housing in Suburbia*, 22 L. & INEQUALITY 31, 31–72 (2004).

were added in this period, with 9400 of these units, or seventy percent, at the developing edge of the suburbs.<sup>108</sup>

The change in subsidized family housing was even more dramatic. Before 1975, seventy percent of subsidized family housing was built in the central cities. By 1976, almost sixty percent was built in the suburbs and by the end of the decade virtually all of family subsidized housing was being built in the suburbs.<sup>109</sup>

During the 1970s, the region's subsidized housing policies effectively defined what "affirmatively furthering fair housing" means.

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<sup>108</sup> See Metropolitan Council, *Housing Opportunity in the Twin Cities: A Staff Background Report on the Local and Regional Response 1967-1978* (Oct. 1978) at 3 [hereinafter *Twin Cities Housing Opportunity*].

<sup>109</sup> See Berkeley Planning Associates, *Assessment of the Impact of the Housing Opportunity Plan (AHOP) Final Report: Volume II, Case Study Narratives* (Nov. 1, 1979), prepared for the Office of Community Planning and Housing Development, U.S. Department of Housing and Urban Development under Contract H-4308 at III-17.

### **Subsidized Housing in the Twin Cities in the 197**

<u>Year</u>	<u>Region</u>	<u>Central Cities</u>		<u>Suburbs</u>	
	<u>New Units</u>	<u>New Units</u>	<u>Share</u>	<u>New Units</u>	<u>Share</u>
1971-72	4,139	2,668	64%	1,471	36%
1972-73	2,147	1,083	50%	1,064	50%
1973-74	917	504	55%	413	45%
1974-76	5,363	2,029	38%	3,334	62%
1977	4,657	1,255	27%	3,402	73%
1978	2,099	831	40%	1,268	60%
1979	2,329	724	31%	1,605	69%
Totals	21,651	9,094	42%	12,557	58%

### **Cumulative Totals of Subsidized Housing**

(includes units provided before 1971)

<u>Year</u>	<u>Region</u>	<u>Central Cities</u>		<u>Suburbs</u>	
	<u>Total Units</u>	<u>Total Units</u>	<u>Share</u>	<u>Total Units</u>	<u>Share</u>
July, 1971	18,736	16,858	90%	1,878	10%
July, 1973	24,202	19,877	82%	4,325	18%
July, 1974	25,013	20,414	82%	4,599	18%
Dec., 1976	27,986	20,118	72%	7,868	28%
Dec., 1977	31,851	21,060	66%	10,791	34%
Dec., 1978	34,650	21,891	63%	12,759	37%
Dec., 1979	37,268	22,556	61%	14,712	39%

### **Family Housing**

<u>Year</u>	<u>Region</u>	<u>Central Cities</u>		<u>Suburbs</u>	
	<u>Total Units</u>	<u>Total Units</u>	<u>Share</u>	<u>Total Units</u>	<u>Share</u>
pre-1975	11,957	8,367	70%	3,590	30%
1975-76	3,578	1,537	43%	2,041	57%
1977-79	2,022	10	0%	2,012	100%

### **Second Wave: The Return to a Segregated Housing Policy: 1983-1995**

Implementation of LUPA's housing elements changed drastically in 1983. There were several causes. First, a new governor had been elected—Rudy Perpich cared little about metropolitan issues and appointed two Met Council chairs with little experience. Next, Congress slashed federal housing subsidies in the early 1980s and President Reagan weakened the important A-95 provision. Professor Goetz argues that as the region became more diverse, growing racial bias also contributed to the Met Council withdrawal from its fair share program.

Goetz writes:

[A]s more people of color moved to the area, greater concentrations of poverty and attendant social problems emerged in core neighborhood. The social and economic homogeneity that had been the foundation of almost two decades of regional problem-solving began to disappear. With it went the language of regional commitment to low-cost housing needs under the fair share method.<sup>110</sup>

Neither of changes in federal policy listed above should have been decisive. First project-based HUD subsidies would be soon replaced by the Low-Income Housing Tax Credit (LIHTC), which could have been used to accomplish fair share goals. However, the Council never attempted to integrate its program with the tax credit and did not object when the legislature, at the behest of the city of Minneapolis, dedicated most of the tax credit to the central cities in 1986 making real fair share impossible.

Moreover, while the A-95 review no longer mandated that the Met Council review all federal requests for federal aid to local government, it still allowed them to do so. Many federal programs that the Council had review authority were discontinued and replaced by state programs over which the Met Council had clearer authority. In the end, the Council was the Metropolitan Planning Organization (MPO) and maintained powerful control over federal transportation dollars and because federal sewer funds were replaced by new metropolitan funds directly under the Met Council's direct control, the Council actually had more leverage over local government actions than ever before. First, as the region's MPO and regional transit agency it retained control over this revenue stream and was given even greater flexibility to program these funds to reward compact inclusive development by spending them for either transit or highways under the Intermodal Surface Transportation Efficiency Act (ISTEA) passed in the early 1990s. While in the early years it could recommend sewer funds to inclusive communities, the federal government sometimes ignored these recommendations. During the 1980s, it began through the Metropolitan Waste Control Commission to issue its own bonds for new sewer infrastructure and thus had even greater control over these so-called carrots. It also retained control over significant regional park funds that had proven a very persuasive carrot.

Nevertheless, by 1983 the Met Council no longer accounted for the low- to moderate-income housing performance of local governments when it evaluated grant applications and it soon withdrew its inclusionary development guidelines. Goetz also notes that the Met Council stopped monitoring whether local zoning matched comprehensive plans and quietly allowed the communities he studies to rezone seventy-eight percent of the land designated as high-density for affordable housing to other uses. Overall, Goetz concluded that approximately thirty-eight percent of the acreage designated for high-density development had been re-designated for low or medium density residential development. An additional sixteen percent has been re-designated for PUD's at indeterminate densities and seventeen percent zoned for nonresidential use. Only twenty-two percent of the acreage originally guided for inclusionary development remained in place.<sup>111</sup>

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<sup>110</sup> Goetz, et al., *supra* note 107.

<sup>111</sup> According to Goetz, had this acreage remained high density, 104,733 housing units could have been built. By 2001, these parcel of land would accommodate only 46,000 hundred fifty-two units a staggering fifty-six percent reduction in residential

During the course of the 1980s, the region returned to the segregative patterns of the period prior to 1970. From 1980 to 1989, the region added 12,000 units of subsidized housing and about sixty percent were built in the suburbs. However, because of changes at the federal and state level, the pattern before 1986 was much more pro-integrative than after. In 1983, all federal Section 8 construction and substantial rehabilitation was suspended (although 4000 units already in the pipeline were ultimately built). In 1986, the Low-Income Housing Tax Credit Program (LIHTC) became the dominant mechanism for building and rehabilitating subsidized housing. When the program began, central cities housing officials, angry at the loss of low income housing funds to the suburbs during the 1970s, petitioned the legislature to create central city sub-allocators for LIHTC funds. This move guaranteed that the central cities would receive at least fifty percent of subsidized housing, even though they were only one-third of the region's population at the time. The central cities' housing offices wanted the money and suburban legislators would not publically fight to keep a majority of new low income housing construction and rehabilitation in their communities.

This change would contribute to the eventual racial and social isolation and academic failure of previously racially integrated, academically solid public schools in the central cities. During this period, both central cities schools would move from modest shares of poor and non-white students to levels that eventually made it impossible to remain racially and socially integrated. During the 1980s, at least partly due to the return to a segregated subsidized housing policy, the concentration of blacks in extreme poverty census tracts increased faster in the Twin Cities than in any other large U.S metropolitan areas except Milwaukee, Detroit, and Buffalo.<sup>112</sup> Had the regional fair share policy been maintained, central cities schools today would have had a much greater chance of remaining racially and socially integrated, instead of being seventy-five percent non-white and poor, with greatly diminished enrollment levels and academic ratings. It is also likely that the recent devastating impact of the mortgage crisis would not have been as great.

### Third Wave: The Perpetuation of a Racially Segregated Housing Policy 1995-Present

In 1995, the legislature attempted to prod the Met Council back to its "fair share policies" but the Council resist. The legislature created new regional funds to give the Council more carrots and provide it, by statute, the power to "negotiate with each community to establish affordable and life-cycle housing goals for that municipality which are consistent with and promote the policies of the Met Council as provided in the adopted Metropolitan Development Guide."<sup>113</sup> This clearly indicated that the legislature wanted the Council to resume its fair share goals and enforcement. The Council was also given clear authority to use its leverage to achieve housing goals. The 1995 law stated: "The Council when making discretionary funding decisions *shall give* consideration to a municipalities participation in the local housing incentives account."<sup>114</sup> The legislation also greatly strengthened the Council's

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development potential. (These calculations use the maximum possible units under zoning designations.) This means a potential 58,618 units were lost on these parcels. In particular some communities have changed their zoning plans or plan designation of this land quite extensively or perhaps never updated their zoning maps to conform to their comprehensive plans: just thirteen communities account for more than ninety-nine percent of the lost units.

<sup>112</sup> Paul Jargowsky, *Ghetto Poverty Among Black in the 1980s*, 13(2) J. POL'Y ANALYSIS & MGMT. 306 (1994). The comparison is limited to metros with more than one million residents.

<sup>113</sup> MINN. STAT. § 473.254(2) (2012).

<sup>114</sup> *Id.* § 473.254(1)(c).

control over local zoning, by making clear that local zoning had to match Council approved comprehensive planning.<sup>115</sup>

The Council however ignored the legislature's directive to resume its fair share housing system. Dragging its feet, it negotiated much less than the fair share goals required by the legislature and the state constitution, and it encouraged communities to substitute these weak goals for their fair share obligations where they remained in force.

Prior the passage of the Fair Housing Act, virtually all subsidized housing in the Twin Cities was located in the poorest urban neighborhoods. In 1974, Minnesota passed a fair share requirement in its Metropolitan Land Use Planning Act (LUPA) that required all communities in the region to provide for their fair share of affordable housing. From 1970 to 1983, low income housing siting became much more racially integrated. During this fifteen year period, about seventy percent of government subsidized housing, and an even higher share of family housing, was built at the developing edge of the region, in the whitest and most opportunity rich communities.

In recent years, subsidized housing policy in the region has reverted to pre-1970 patterns. From 2007 to 2011, eighty percent of the very low-income housing was built in the poorest and most racially isolated neighborhoods in the region, an even worse record than before the passage of the fair share requirement in the land use planning act in 1976.<sup>116</sup>

In 2013, fifty-five percent of all subsidized units in the region are in neighborhoods with more than twenty-nine percent of population nonwhite, compared to just twenty-three percent of total housing units. The poverty rate in these neighborhoods is twenty-three percent compared to six percent in the rest of the region. The differences are even more dramatic in the central cities. In Minneapolis and St. Paul, eighty-five percent of all subsidized units are in neighborhoods more than twenty-nine percent nonwhite, compared to just fifty-five percent of all housing units. These tracts were twenty-nine percent poor compared to thirteen percent for the rest of the two cities.<sup>117</sup>

Subsidized housing is even more highly concentrated near racially segregated and re-segregating schools and virtually non-existent in areas near predominately white or stably integrated schools in the Twin Cities seven-county region. By 2013, sixty percent of the region's subsidized housing was located near schools that were segregated (more than fifty percent non-white). These schools serve only twenty-six percent of the region's students. Another twenty-five percent was near schools that were re-segregating (thirty to fifty percent of students non-white).<sup>118</sup> Only sixteen percent of the region's subsidized housing was located by schools that were predominantly white or stably integrated. These schools had fifty-four percent of the region's students.<sup>119</sup>

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<sup>115</sup> *Id.* § 473.865(2); *Lake Elmo v. Metro. Council*, 685 N.W.2d 1 (Minn. 2004); Brian W. Ohm, *Reviving Comprehensive Planning in the Twin Cities Metropolitan Area: The 1995 Amendment to MPLA*, 8 MINN. REAL ESTATE J. 81 (1995).

<sup>116</sup> HousingLink, *2011 Housing Counts*.

<sup>117</sup> Numbers calculated by author. 2013 HOUSINGLINK STREAMS, <http://www.housinglink.org/streams/> (last visited Sept. 27, 2012); 2012 U.S. Census Bureau sf. 1.

<sup>118</sup> Numbers calculated by author. 2013 HOUSINGLINK STREAMS, <http://www.housinglink.org/streams/> (last visited Sept. 27, 2012); 2012-2013 Minn. Dep't of Educ.

<sup>119</sup> Numbers calculated by author. 2013 HOUSINGLINK STREAMS, <http://www.housinglink.org/streams/> (last visited Sept. 27, 2012); 2012-2013 Minnesota Dep't of Education.

In the central cities, eighty-one percent of subsidized housing was located near segregated schools and another eighteen percent near re-segregating schools. Only two percent of subsidized housing in the central cities was located by predominantly white or stably integrated schools, even though these schools served more than five times this percentage of the cities' public school students.<sup>120</sup>

The recent production of affordable housing demonstrates that government housing policy at all levels is perpetuating racial segregation in the metropolitan area. In the last ten years, the Twin Cities has gone from 8 to 108 racially segregated elementary schools.

Most recently, the placement of very low-income subsidized housing is as segregated as ever. Between 2004 and 2011, the region produced 1420 new very affordable units (affordable to those earning thirty percent of the metro median income).<sup>121</sup> In the central cities, which have twenty-three percent of the region's population, eighty-one percent of these units were produced.<sup>122</sup> In other words, the central cities received more than 3.5 times their fair share of very low-income units. Virtually all of these units were located by segregated or re-segregating schools. Of the 8261 new *and preserved* very affordable units from this period, seventy-six percent were in the central cities or 3.3 times their fair share. The region preserved 3567 very affordable units. Of these units, fifty-four percent were in the central cities, or 2.3 times their fair share.<sup>123</sup>

Another cut on the data shows that between 2007 and 2011, the Twin Cities produced 3306 new units of publicly supported affordable housing. Of these units, fifty-two percent were built in the two central cities, or 2.3 times their fair share.<sup>124</sup> The Twin Cities produced or preserved 9923 affordable units during this period and fifty-two percent of these units were in the central cities—again, 2.3 times their fair share.<sup>125</sup> Of the 6616 preserved affordable units, fifty-one percent were preserved in the central cities, or 2.2 times their fair share.<sup>126</sup>

During this period, Minneapolis produced 1335 new publically supported units, or almost forty percent of the new subsidized housing in the region, or three times the city's 13.3 percent share of population.<sup>127</sup> During the same time, thirty-nine percent of all units built or preserved in the region were in Minneapolis, again about three times its regional fair share.<sup>128</sup>

The trends, as bad as they are, actually seem to be accelerating. According to HousingLink, the two central cities built seventy-seven percent of the region's new government subsidized affordable units in 2011 and built or preserved sixty-four percent of all units.<sup>129</sup> According to HousingLink, Minneapolis by itself built fifty-one percent of new subsidized units (or 3.8 times its fair share) and built or preserved forty-four percent of units (3.3 times its fair share).<sup>130</sup> The Met Council found that

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<sup>120</sup> *Id.*

<sup>121</sup> HousingLink, *2011 Housing Counts*.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> The McKnight Foundation, *2011 Minnesota Housing Baseline Measures* (December 2012) at 2.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> HousingLink, *2011 Housing Counts*.

<sup>130</sup> *Id.*

sixty percent of all the affordable housing in the region were built in the central cities, 2.6 times their fair share.<sup>131</sup> By the Met Council's figures, Minneapolis built thirty-eight percent of the affordable units or 2.8 times its fair share.<sup>132</sup>

- a. The FHEA fails to report the 1986 state creation of segregative central city sub-allocators of the Low Income Housing Tax Credit which unnecessarily intensifies segregation in housing and schools.

In 1986, LIHTC became the dominant form of federal subsidy for low-income housing. Rather than continuing Policy 13/39 and fully coordinating the award of tax credits to support the Met Council's pro-integrative fair share goals, the State of Minnesota created a sub-regional allocation system that encourages racial segregation rather than promotes racial integration.<sup>133</sup> Almost all of the housing allocated to sub-allocators has been sited in concentrated minority areas in which the public schools are completely racially and economically segregated and academically low-performing.

- b. The FHEA fails to report that the state Qualified Allocation Plan (QAP) incents racial segregation by awarding more points to racially segregative projects than racially integrated projects.

The Federal Fair Housing Act applies to the Low Income Housing Tax Credit. As such, state agencies must collect racial data on the location and occupancy of tax credit units.<sup>134</sup> The draft FHEA fails to report this information and the QAP does not mention either race or the Fair Housing Act. Contrary to law, the QAP creates a scoring system that encourages racial segregation and the placement of housing projects in areas of minority concentration, rather than fulfilling its clear obligation to affirmatively further fair housing and integrate housing.

For example, Minnesota awards *no points* for racial integration at all. It awards only one or two points for projects in low-poverty areas. In contrast, virtually all of the other criteria—well over 100 points—appear to promote the placement of units in areas of minority concentration or re-segregation.

For example, “readiness to proceed” favors areas with less community opposition (twenty-four points). Moreover, “rehabilitation of existing structures” (ten points), “being part of community revitalization plan” (two points), “using existing water or sewer” (ten points), “foreclosed properties” (five to ten points), “preservation of existing credits” (twenty points), “preservation of existing tax credit units” (ten points), “permanent housing for the homeless” (110 points), “transit oriented developed” only by light rail transit (LRT), bus rapid transit (BRT) or commuter rail, not basic bus

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<sup>131</sup> Metropolitan Council, *MetroStats: Affordable Housing Production in the Twin Cities* (March 2013) at 4 (draft).

<sup>132</sup> *Id.*

<sup>133</sup> See MINN. STAT. § 462A.222(1) (2012) (creating Minneapolis and St. Paul as sub-allocators of the tax credit); MINN. STAT. § 462A.222(2) (2012) (allocating the credit to both central cities at 1.25 times population with additional allocation points based on the number of welfare recipients).

<sup>134</sup> See *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan*, 848 A.2d 1, 15–17 (N.J. Super. Ct. App. Div. 2004).



service (three points), “serves lowest income tenants”(thirteen points), and “local philanthropic contribution” (which favors local Community Development Corporations operating in segregated neighborhoods) (ten points) seem to favor core city projects over areas with high-performing and predominantly white or integrated schools.<sup>135</sup>

Furthermore, even housing growth (ten points), which would generally appear to be pro-integrative, actually prioritizes housing in Minneapolis and St. Paul, which have recently lead new housing starts.

In September of 2012, Minnesota Housing proposed and later implemented changes to the definition of “Workforce Housing” as these changes concern the Twin Cities metropolitan area.<sup>136</sup> These changes would focus workforce exclusively on jobs and job growth and move away from using housing growth as a selection factor. I objected to this because this would bias the criteria for project selection toward segregated and unstably integrated neighborhoods and away from predominantly white or stably integrated communities. My comments were ignored.

As a group, the “high existing jobs” category is thirty-six percent non-white compared to the “high household growth” cities which were seventeen percent non-white. By shifting the QAP selection criteria to “existing jobs,” Minnesota Housing would incent more projects into the deeply racially segregated neighborhoods of Minneapolis and St. Paul and into re-segregating cities like Bloomington. Bloomington is city whose East side schools and neighborhoods are in rapid racial transition to majority non-white poor status.

Further, giving too much weight to job growth, without other race-conscious criteria, will prioritize housing in cities, such as Richfield, that are experiencing rapid and negative patterns of racial re-segregation, and cities like Maplewood, Shakopee, Eagan, and Eden Prairie, communities that are struggling to keep white families in their school districts.

Next, Minnesota Housing appears to believe that locating housing in proximity to jobs or transit lines somehow fulfills its fair housing duty to use it “immense leverage to assure racially integrated housing patterns.” This is also clearly wrong under the law. These criteria are only acceptable to help choose between two otherwise pro-integrative locations or to provide alternative factual rationales to otherwise pro-integrative siting decisions. To the extent that these criteria are used to cause housing be located in a racially segregative or re-segregative manner, they are unlawful.<sup>137</sup>

c. The central city’s Qualified Allocation Plans incents segregative housing placement.

Together, Minneapolis and St. Paul have also adopted a qualified allocation plan (QAP) that directly incents the segregative placement of low-income units within the cities.<sup>138</sup> Specifically, the

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<sup>135</sup> See Minnesota Housing, Self-Scoring Worksheet, 2012 Housing Tax Credit Program, [http://www.mnhousing.gov/idc/groups/multifamily/documents/webasset/mhfa\\_010882.rtf/](http://www.mnhousing.gov/idc/groups/multifamily/documents/webasset/mhfa_010882.rtf/).

<sup>136</sup> “Possible Changes to the 2014 Qualified Allocation Plan (QAP)” outlined in Minnesota Housing memo to Agency Partners and Stakeholders dated September 24, 2012.

<sup>137</sup> See *Inclusive Communities Project*, 749 F.Supp. 2d. at 503–4.

<sup>138</sup> See Minneapolis/Saint Paul Housing Finance Board Low Income Housing Qualified Allocation Plan, available at [http://www.ci.minneapolis.mn.us/www/groups/public/@cped/documents/webcontent/convert\\_254711.pdf](http://www.ci.minneapolis.mn.us/www/groups/public/@cped/documents/webcontent/convert_254711.pdf). See also

central cities' QAP gives over 100 points for projects likely to be in high-minority, high-poverty neighborhoods, no points for racially integrated projects, and only ten points for "economic integration." (By the cities' definition, an economically integrative project is one in a neighborhood which is up to fifty percent non-white and with no limits on non-white and/or poor kids in local schools.<sup>139</sup>) A similar QAP in Dallas was recently found to be a disparate impact violation of the Fair Housing Act.<sup>140</sup> In addition, the central cities do not collect racial data on LIHTC units and the state maintains that it has no responsibility to monitor the conduct of its sub-allocators.

- d. The FHEA does not document the failure of relevant state agencies, including Minnesota Housing, the Met Council, and the State Department of Education, to coordinate racial integration of housing and schools.

In 1994, the Minnesota legislature provided authority to relevant state agencies to coordinate housing and school integration. State and local governments have created three unique city-suburban racial integration districts capable of administering racially integrated schools on a metropolitan level.<sup>141</sup> This effort to coordinate integrated schools and housing was undermined by later developments, including the 1999 desegregation rule and the failure of the Met Council and Minnesota Housing to coordinate their efforts with the State Department of Education and the Metropolitan Integration Districts.

Both federal and Minnesota law require (or at the very least authorize) housing and education agencies to coordinate their integration efforts. The Federal Fair Housing Act requires that HUD and public housing authority grantees (such as Minnesota Housing, the Met Council, Minneapolis, St. Paul, and their public housing authorities) consider *the racial composition of neighborhoods and schools* when siting low-income family housing.<sup>142</sup> The Fair Housing Act *mandates* that these entities, together with HUD, use their "immense leverage" to "further integrated and balanced living patterns."<sup>143</sup> As a part of this obligation, federal law presumptively prohibits building new low-income family housing in racially segregated or unstably integrated neighborhoods.<sup>144</sup> Minnesota law gives the Met Council

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Memorandum from Myron Orfield to Gloria Stiehl, Minnesota Department of Employment and Economic Development, Comments on 2011 Minnesota Analysis of Impediments to Fair Housing Choice (Dec. 31, 2011), 13–14 (attached as Appendix) (outlining how the qualified allocation plan incents segregative placement of low-income units within the metropolitan area).

<sup>139</sup> Minneapolis and St. Paul have created qualified allocation plans (QAPs) that provide ten points for a segregated redevelopment area, ten points for Hennepin Home program match (in segregated neighborhoods), up to twenty points for working with non-profits (who, in Minneapolis, virtually all operate only in segregated neighborhoods), five points for projects with established resident aid programs (all in segregated neighborhoods), five points for projects with the support of neighborhood groups, up to twenty points for rehabilitation (again, almost all existing projects are in segregated neighborhoods), up to fifteen points for projects with previous subsidies, up to fifteen points for project with additional financial additional support, up to fifteen points for intermediary support, and up to ten points for the most active transit corridors. There are no points for racial integration and only ten points for economic integration. *See id.*

<sup>140</sup> *See Inclusive Communities Project*, 749 F. Supp. 2d 486.

<sup>141</sup> Myron Orfield, *Regional Strategies for Racial Integration of Schools and Housing Post-Parents Involved*, 29 LAW & INEQ. 149, 166–67 (2011).

<sup>142</sup> 42 U.S.C. § 3608 (d); 24 C.F.R. § 941.202 (g) (2013); *Shannon*, 436 F.2d 809. *See* 24 C.F.R. § 941.202 (2013).

<sup>143</sup> *NAACP v. Sec'y of HUD*, 817 F.2d at 156 (stating that Title VIII imposes a duty on HUD beyond simply refraining from discrimination).

<sup>144</sup> *Shannon*, 436 F.2d 809; *see also* Fair Housing Act, 24 C.F.R. § 941.202 (2013).

power to comment on local school district siting decisions<sup>145</sup> and the desegregation rule authorization simultaneously requires the Department of Education to “consult with the Metropolitan Council to coordinate school desegregation efforts with the housing, social, economic, and infrastructure needs of the metropolitan area.”<sup>146</sup> The state legislature has also facilitated the creation of three large city-suburban integration school districts to facilitate and coordinate more integrated schools on a metropolitan-wide basis, in consultation with the Met Council.

While the state did not require the agencies to coordinated state housing and school integration efforts, it authorized them to do so. In this context, this failure to act must be interpreted as a failure to affirmatively further fair housing.

- e. The draft FHEA fails to report on segregative school decisions as drivers of housing segregation.

The Fair Housing Act requires HUD and its grantees to consider the racial balance of schools attended by government-supported housing recipients. The clear implication of this legal requirement is that stably racially integrated schools are a central component of fair housing policy.

On February 23, 2010, Secretary Shaun Donovan clarified HUD’s Fair Housing priorities before Congress, stating:

[S]ustainability also means creating “geographies of opportunity,” places that effectively connect people to jobs, **quality public schools**, and other amenities. Today, too many HUD-assisted families are stuck in neighborhoods of concentrated poverty and segregation, where one’s zip code **predicts poor educational**, employment, and even health outcomes. These neighborhoods are not sustainable in their present state.<sup>147</sup>

When the legislature authorized a metropolitan school desegregation rule, it required the Department of Education to “consult with the Metropolitan Council to coordinate school desegregation efforts with the housing, social, economic, and infrastructure needs of the metropolitan area.”<sup>148</sup> The Minnesota Legislature has also facilitated the creation of three large city-suburban integration school districts to facilitate and coordinate, in consultation with the Metropolitan Council, more integrated schools on a metropolitan basis.<sup>149</sup>

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<sup>145</sup> See MINN. STAT. §§ 473.145, 473.175, 473.385 (1975) (Council has review over location of public schools, school district capital plans, and can reject school districts plans that are inconsistent with regional goals and objectives).

<sup>146</sup> MINN. R. 3535; See also 1994 Minn. Laws, Ch. 647, Art. 8(2)(1)(c) (“[T]he office of desegregation shall periodically consult with the metropolitan council to coordinate school desegregation efforts with the housing, social, economic, and infrastructure needs of the metropolitan area....The commission of education may request information and assistance from, or contract with, any state or local agency or officer, local unit of government, or recognized expert to assist the commissioner in performing these activities.”).

<sup>147</sup> Press Release, HUD, Written Testimony of Shaun Donovan: FY2011 Budget Request for HUD (Feb. 23, 2010) (emphasis added), available at <http://portal.hud.gov/hudportal/HUD?src=/press/testimonies/2010/2010-02-23>.

<sup>148</sup> MINN. R. 3535; See also 1994 Minn. Laws, Ch. 647, Art. 8(2)(1)(c).

<sup>149</sup> For information on the three integration school districts, see West Metro Education Program (WMEP) at <http://sites.google.com/a/wmep.k12.mn.us/wmep-k12-mn-us/>; East Metro Integration District (EMID) at <http://www.emid6067.net/>; and Northwest Suburban Integration District (NWSID) at [http://www.nws.k12.mn.us/About\\_NWSISD.html](http://www.nws.k12.mn.us/About_NWSISD.html).

School data for the Twin Cities shows a dramatic increase in racial isolation. In 1995, there were only fifteen elementary schools and twenty middle/high schools with more than seventy-five percent of their students nonwhite. By 2011, the number of elementary schools in this group had increased six times (to ninety percent) and by more than three times for middle/high schools (to seventy-one percent).

Segregation in schools and neighborhoods are closely related. Segregated neighborhoods, of course, generate segregated neighborhood schools, but there is also feedback from school characteristics to neighborhoods. Potential residents, especially families with children, evaluate local schools when deciding where to live. This means that racial or social transition in schools— and the record shows that schools can change character very rapidly— can accelerate neighborhood transition. Indeed, racial change in schools is very often the precursor of neighborhood change. By the same token, stably integrated schools can stabilize neighborhoods.

When local school districts gerrymander school boundaries, adopt transfer or construction expansion policies that facilitate greater segregation, this causes the housing market to become more segregated. In Eden Prairie, when Forest Park elementary school was becoming more non-white than the other schools in the city, local officials reported that real estate agents began to steer white families away from that school area. When whites withdraw from a school attendance area, prices fall and blacks respond to this signal, by tightening credit to these neighborhoods. When schools tip and become segregated, more often than not the neighborhood follow.

Data clearly shows that in parts of the county where the schools are more segregated the housing market are more segregated. When proactive means have been undertaken to increase school integration, housing integration improves, as does the stability of housing integration.

The United States Supreme Court has declared that housing and school segregation are factually and legally intertwined. In *Milliken*, the Court found that state level housing discrimination could justify a city-suburban or metropolitan school busing order and several federal courts have used evidence of housing discrimination to justify such orders. Similarly, under the Fair Housing Act, the federal courts have declared that the racial composition of local schools must be taken into account when siting federally supported low income housing in order to avoid violation of 42 U.S.C. §§ 3604 and 3608.<sup>150</sup>

In *Swann v. Charlotte-Mecklenburg*, the Supreme Court held that once a school district, as an agent of the state, was found to have committed an act of de jure segregation, federal courts must enjoin school construction policies that would foster further segregation.<sup>151</sup> At the time of the drafting of LUPA, Minneapolis, as an agent of the state, was declared a de jure segregated, which it remains to this day.

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<sup>150</sup> *Shannon*, 436 F.2d 809; 24 C.F.R. 941.202; 24 C.F.R. 880.206; 78 Fed. Reg. at 11460-01 at 11479–81 (proposed Feb. 15, 2013), 2013 WL 550406 (2013).

<sup>151</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 401 U.S. 1 (1971).

Professor Robert Freilich who drafted the land use planning act, was also an expert on school desegregation law. He stated that was one of the most important reasons that he insisted that schools be included in the land use planning act and that school construction specifically be under the supervision of the Met Council, was in order to help the state avoid a possible constitution violation that would result in a metropolitan wide school desegregation order.

According to statute, the Met Council “shall adopt a development guide” that “will encompass the physical, social and economic needs of the metropolitan area and those future developments which will have an impact on the entire area” including “the location of *schools*.”<sup>152</sup> LUPA states that for purposes of Chapter 473 “local government unit” means “school district”<sup>153</sup> and the Met Council is required to provide notice of rule changes and related hearings to all school districts in the metropolitan area.<sup>154</sup> The law further requires the Council to “construct an inventory” of all schools in the metropolitan area and the unused space within each school<sup>155</sup> and the council may submit its comments to the commissioner of education on any school district facility that is proposed in the metropolitan area.

LUPA requires that a local government unit’s comprehensive plans shall contain a statement on “the effect of the plan on affected school districts”<sup>156</sup> and these comprehensive plans must be submitted to the affected school district for review and comment six months prior to their submission to the Council.<sup>157</sup> Finally, it suggests that these comprehensive plans contain an intergovernmental coordination process for cooperation with school districts generally and the siting of public schools in particular.<sup>158</sup> There are four other additional references to schools in LUPA.<sup>159</sup>

School Choice Programs: Minnesota is a national leader in school choice. The state’s 1988 mandatory open enrollment law was the first of its kind in the nation. Similarly, it has the longest experience with charter schools of any state in the country – the state’s first charter school opened in 1991. By 2010, more than 35,000 students open enrolled from one school district to another and more than 30,000 students were enrolled in charter schools in the Twin Cities.<sup>160</sup> This represents roughly thirteen percent of the public school students in the eleven Minnesota counties included in the Twin Cities metropolitan area.

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<sup>152</sup> MINN. STAT. § 473.145 (2013) (emphasis added).

<sup>153</sup> *Id.* § 473.121(6); MINN. STAT. § 473.852(11) (2012) (stating that “school district” has the meaning given by MINN. STAT. § 120A.05).

<sup>154</sup> MINN. STAT. § 473.174(5) (2012).

<sup>155</sup> *Id.* § 473.23(1).

<sup>156</sup> *Id.* § 473.859(1).

<sup>157</sup> *Id.* § 473.858(2).

<sup>158</sup> *Id.*

<sup>159</sup> MINN. STAT. § 473.3875 prioritizes transit for livable communities grants to evaluate projects coordinating school and public transportation. Minn. Stat. §473.625 discusses the process of detaching airport land from school districts, MINN. STAT. §473.629 addresses proper valuation of property for bond issues by school districts and MINN. STAT. §473.661 covers airport noise mitigation resources for school districts.

<sup>160</sup> Minnesota has long experience with other choice programs as well. The Choice is Yours Program, a choice option which allows low-income students in the Minneapolis School District to enroll in suburban districts, is a central part of the State’s response to a desegregation suit brought in the 1990’s. Magnet schools are also used by many school districts in the state. Although magnets are most often offered by districts as an option for their own students, in some cases they are used to encourage inter-district student transfers.

Both of these choice programs were originally promoted as a means to increase racial integration in schools.<sup>161</sup> However, recent research shows that each, instead, now actually increases segregation in the region's schools.

Published studies show that both of Minnesota's major choice programs have clearly allowed a pattern of transfers that increases segregation in the region's schools.<sup>162</sup> Two recent studies by the Institute on Metropolitan Opportunity show that charter schools in the Twin Cities are much more segregated than their traditional counterparts.<sup>163</sup> The most recent data show that in 2010-11, charter schools were twice as likely as traditional public schools to be segregated and only one-half as likely to be integrated.<sup>164</sup>

Put another way, the 2010-11 data show that eighty-nine percent of all black students in charter schools attended nonwhite segregated schools. This compares very poorly with traditional public schools where only forty-four percent of black students attended nonwhite segregated schools. The equivalent comparison for Hispanic students was seventy-three percent (charters) versus thirty-nine percent (traditionals) and for Asian students it was eighty-five percent versus thirty-seven percent. White students were also more likely to be in a segregated setting in charter schools—seventy-four percent of white charter students were in predominantly white schools compared to just fifty-seven percent of white students in traditional schools.<sup>165</sup>

Until recently, the overwhelming majority of charter schools were in the cities of Minneapolis and St. Paul. However, the last decade has seen the spread of charters into suburban areas and these new charters are often predominantly white schools which have located in or near suburban neighborhoods where schools are in racial transition. Examples of predominantly white charters located in racially diverse suburban areas includes schools in Bloomington, Burnsville, Chaska, Eden Prairie, Coon Rapids, St. Paul Park, Maple Grove and New Hope.<sup>166</sup>

The U.S. Supreme Court ruled in *Swann v. Charlotte-Mecklenburg* (402 U.S. 1) that a number of single-race schools, particularly in a district with a history of discrimination, created a presumption of intentional discrimination, and that the district bore the burden of proving that its actions were not

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<sup>161</sup> See, for instance, T. Kolderie, *Creating the Capacity for Change: How and Why Governors and Legislatures are Opening a New-Schools Sector in Public Education*. (Education Week Press, 2004); Chester E. Finn, B. V. Manno and G. Vanourek, *Charter Schools in Action: Renewing Public Education*. (Princeton, N. J.: Princeton University Press, 2000); Jay P. Greene, "Why school choice can promote integration." *Education Week*, 19:31 (2000), p. 72; Joe Nathan, *Charter Schools: Creating Hope and Opportunity for American Education*. (San Francisco: Jossey-Bass Publishers, 1996).

<sup>162</sup> On charters, see "Failed Promises: Assessing Charter Schools in the Twin Cities," Institute on Race and Poverty, November 2008, and "Update of IRP's 2008 Report on Charter Schools in the Twin Cities," January, 2012, available at <http://www.law.umn.edu/metro>. "Failed Promises..." includes a full review of other studies. See "Open Enrollment and Racial Segregation in the Twin Cities: 2000-2010," Institute on Metropolitan Opportunity, January, 2013 for the most recent published work on the open enrollment program.

<sup>163</sup> It is also clear that there is no payoff in student performance to compensate for the costs of this added segregation. Every comprehensive study ever done on student performance in charter schools in Minnesota – and there have been at least seven of them – has concluded that, as a group, charters are outperformed by their traditional public school counterparts.

<sup>164</sup> "Update of IRP's 2008 Report on Charter Schools in the Twin Cities," Jan. 2012, Table 1 at 3.

<sup>165</sup> *Id.* Chart 2 at 4.

<sup>166</sup> "Update of IRP's 2008 Report on Charter Schools in the Twin Cities," Map 2 at 6.

the result of past or present discrimination.<sup>167</sup> The current charter school system in Minnesota would clearly be very difficult to defend on this basis, given that it exempts charter schools from the state desegregation rule and has allowed the proliferation of single race white and non-white charter schools.

The open enrollment law in Minnesota requires that all school districts allow applicants to attend district schools from anywhere in the state.<sup>168</sup> Open enrollment allows parents a wider choice in matching a school's programs to a child's needs and creates clearer competition between schools that could encourage innovation or improvement. However, open enrollment also enables moves based on less noble motivations, including race. Research demonstrates that racial enrollment patterns can change rapidly even without open enrollment.<sup>169</sup> If actual open enrollment patterns reinforce these trends then the program will have the effect of accelerating racial change in already unstable schools, neighborhoods and communities.

The region's two large central city districts – Minneapolis and St. Paul – are affected dramatically by open enrollment. Each loses a substantial number of students from open enrollment. The net loss (open enrollees leaving the district minus those coming in) in 2009-2010 was roughly 1200 students in Minneapolis and nearly 700 in St. Paul. Net losses of white students account for nearly all of the change. Minneapolis and St. Cloud each lost roughly 1100 white students while St. Paul's loss of white students (850 students) actually exceeded its total net loss. (Some of the net loss of white students was made up in other categories.) Losses like this in the region's most diverse districts clearly increase segregation in the overall school system.

Many racially diverse suburban districts, including Columbia Heights, Richfield, Anoka-Hennepin, Osseo, Burnsville-Eagan-Savage and Robbinsdale, are affected in similar ways, losing large numbers of white students to nearby, less diverse districts. On the other side of this ledger is a group of predominantly white suburban districts which are the destinations for many of these flows. These districts are among the largest net "importers" of students from open enrollment and they each draw a pool of nearly all white students from nearby districts that are much more diverse. They include St. Anthony-New Brighton, which draws largely white students from nearby Minneapolis and Columbia Heights and Minnetonka and Mahtomedi which draw from Hopkins, Eden Prairie, East Carver and White Bear Lake.

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<sup>167</sup> 402 U.S. at 25–26.

<sup>168</sup> The law also permits districts to refuse admissions in some circumstances, including some kinds of prior bad behavior by applicants and capacity limitations in schools. Districts may not limit or encourage open enrollments based on extracurricular activities (including athletics), disabilities, limited English, previous disciplinary issues, academic achievement or the student's resident district. See Witte, John F., Deven E. Carlson and Leslie Lavery, *Moving On: Why Students Move Between Districts Under Open Enrollment*, Department of Political Science, University of Wisconsin-Madison, 2008; Carlson, Deven E., Leslie Lavery and John F. Witte, *The Determinants of Open Enrollment Flows: Evidence from Two States*, *Educational Evaluation and Policy Analysis*, Vol. 33 No. 1, 76-94; and 124.D03 Minnesota State Statutes.

<sup>169</sup> For evidence and descriptions of these research literatures, see Orfield, Myron and Thomas Luce, "America's Racially Diverse Suburbs: Opportunities and Challenges," Institute on Metropolitan Opportunity, July 2012, [http://www.law.umn.edu/uploads/e0/65/e065d82a1c1da0bfef7d86172ec5391e/Diverse\\_Suburbs\\_FINAL.pdf](http://www.law.umn.edu/uploads/e0/65/e065d82a1c1da0bfef7d86172ec5391e/Diverse_Suburbs_FINAL.pdf); Orfield, Myron and Thomas Luce, *Region: Planning the Future of the Twin Cities*, University of Minnesota Press, 2010, Chapter 3; Galster, George C, *Neighborhood Social Mix: Theory, Evidence, and Implications for Policy and Planning*, Wayne State University, 2012.

The Supreme Court has ruled that transfer policies that systematically increase racial segregation could lead to ruling that a district was segregated by law.<sup>170</sup> This would be the case whether the action was taken with the intent to discriminate, or if it was reasonably foreseeable that such an action would result in segregation.<sup>171</sup> Minnesota's open enrollment program would be hard to defend in light of these cases.

**Local School Attendance Boundary Policies:**<sup>172</sup> Racial diversity in neighborhood schools almost always precedes racial diversity in neighborhoods. As schools become increasingly diverse in either racially diverse or predominantly white neighborhoods, white parents frequently seek attendance-boundary alterations, transfer policies, or new school buildings or additions allowing them to attend whiter schools. The U.S. Supreme Court has said when school districts draw boundaries in which racial segregation is a foreseeable consequence, it has engaged in de jure or intentional segregation. While these practices and policies can violate federal law, they are common and there is little oversight.

Biased boundary practices can result in predominantly non-white or unstably integrated schools in racially integrated or even predominantly white neighborhoods. Such schools intensify steering and mortgage lending discrimination in relation to the school attendance area, accelerating re-segregation. Recent national research shows that local school boundaries currently create schools that are considerably more segregated than their neighborhoods. If school attendance boundaries more clearly reflected school capacity and neighborhood proximity, American schools would be fourteen to fifteen percent less segregated.<sup>173</sup>

Minnesota's current desegregation rules while certainly *permitting* districts to make pro-integrative decisions, do not affirmatively support such decision-making. Nor do they explicitly prohibit districts from making decisions about school-attendance boundaries or school closings that, in effect, create racially isolated schools. Instead, Minnesota's rules leave the desegregation of racially isolated schools up to the will of local school boards, which often face immense political pressure against pro-integrated boundary changes. The rules do not give the Minnesota Department of Education the tools to force school districts to desegregate schools unless the state can prove that the district intended to discriminate against students of color.<sup>174</sup>

In fact, until recently, based on its reading of the rules, the Department "strongly discouraged" school districts from using racial measures in their desegregation plans and warned districts that "race-

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<sup>170</sup> See *Keyes v. School District No. 1*, 426 U.S. 229 (1976) (*Dayton v. Brinkman*, 443 U.S. 526 (1979) (*Dayton II*); *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979) *reaff'd* 426 U.S. 229. Other actions that could lead to this conclusion included the drawing or alteration of attendance zones that had racially segregative effects; the location of new school construction or expansion of existing schools that increased segregation, or the failure to relieve overcrowding at segregated sites in ways that could increase integration; hiring, promotion, or faculty placement decisions with racially disparate impacts; and perpetuation or exacerbation of district segregation by strict adherence to a neighborhood school policy; see also *Keyes*, 413 U.S. at 201–02, 234–35.

<sup>171</sup> 443 U.S. at 536 n.9.

<sup>172</sup> The discussion of the state rule and Minneapolis relies heavily on Hobday, Finn, and Orfield, "Missed Opportunity: Minnesota's Failed Experiment to Choice Based Integration." 35 Wm Mitch. L. Rev 936 (2009).

<sup>173</sup> See Meredith Paige Richards, "The Gerrymandering of Educational Boundaries and the Segregation of American Schools" (draft dissertation, University of Texas at Austin, 2012).

<sup>174</sup> MINN. R. 3535.0130, subp. 1(2007).



based measures have been successfully challenged in several other states.”<sup>175</sup> Without a state mandate to integrate, school districts have largely chosen to pay lip-service to integration, while maintaining separate schools.<sup>176</sup>

The Minneapolis School District has been involved in two important court regarding segregation in the city’s schools. Suits brought by the NAACP have twice forced the district to implement programs to counteract the effects of attendance boundaries that encouraged or intensified racial separation. The *Booker v. Special School Dist. No. 1* in the 1970s led to a busing program and the settlement of the *Minneapolis Branch of the NAACP v. State of Minnesota* case in the 1990s included the Choice is Yours Program, an extension of open enrollment that facilitates the transfer of low-income Minneapolis students to suburban schools in several participating districts.

Both suits and the court’s findings in *Booker* included extensive documentation of segregative actions by the Minneapolis district. The *Booker* decision used Bethune Elementary School and Washburn High School as examples, describing clear-cut behavior by the district that concentrated students of color in each school.<sup>177</sup> After the of court supervision from the Booker case was lifted, the Minneapolis District began operating under the state “15 percent” rule, which required each school in a district to have minority enrollment within fifteen percentage points of the district average. However, by 1995 the state Board of Education had abandoned the “15 percent rule.”<sup>178</sup> By then, over fourteen percent of the Minneapolis School District’s elementary schools were in violation of the rule.<sup>179</sup> Finally, in 1995 the district returned to neighborhoods, resulting in a return to deeply segregated schools.

As a result, the Minneapolis Branch of the NAACP filed suit in state court on September 1995 charging that the abandonment of the “15 percent rule,” among other actions, showed that the State had not taken effective action to desegregate Minneapolis schools.<sup>180</sup> Additionally, they claimed the state reinforced racial and economic inequality through its school construction policies and its failure to promote integrated housing.<sup>181</sup> In 2000, before the case was tried, the parties reach an agreement.<sup>182</sup>

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<sup>175</sup> Letter from Mary Ann Nelson, Assistant Commissioner, to John Currie, Superintendent of District 196 (June 11, 2004); Letter from Cindy Lavatato, Assistant Commissioner, to L. Chris Richardson, superintendent of Osseo School District (Feb. 4th, 2000); Letter from Cindy Lavarato, Assistant Commissioner, to Carol Johnson, Superintendent of Minneapolis Public Schools (Jan 14, 200) (on file with the Minnesota Department of Education and the Institute on Race and Poverty). During the early years of the rules’ enforcement, Cindy Lavorato was at the helm of the Department and gave this advice, consistent with what she had explained in the SONAR. Lavorato left the Attorney General’s office just after the rules were implemented and served as the Assistant Commissioner of Education for one-and-a-half years. Interview with Cindy L. Lavorato, former Assistant Attorney General, in Minneapolis, Minn. (Sept. 13, 2007).

<sup>176</sup> See, e.g., Thandiwe Peebles, Minneapolis Public Schools, Comprehensive Desegregation/ Integration Plan and Budget (Dec. 15 2004) (stating that the district is committed to racial integration, but refusing to consider North-South bussing of students—even though the overwhelmingly majority Black and Latino schools on the Northside of the city could easily be integrated with the very White schools directly to their South).

<sup>177</sup> See Orfield, Myron, *Choice, Equal Protection and Metropolitan Integration: The Hope of the Minneapolis School Desegregation Settlement*, 24 L. & INEQ. 269 (2006) for a full summary of the case.

<sup>178</sup> Monika Bauerlein, Separate but Equal, CITY PAGES (Minneapolis) Nov. 1, 1995, <http://www.citypages.com/databank/16/778/article2353.asp>.

<sup>179</sup> *Id.*

<sup>180</sup> NAACP Compl. at 15; see also Xiong Compl. at 15–16.

<sup>181</sup> NAACP Compl. at 16; see also Xiong Compl. at 16–17 (noting, as example, failure of Metropolitan Council to ensure suburb of Maple Grove kept its fair housing obligations).

The settlement agreement established two key programs: 1) a program to allow low income Minneapolis students per year to attend suburban schools 2) a program to give low income Minneapolis students preferred access to magnet schools within the District.<sup>183</sup> The suburban plan set aside 2000 spaces for Minneapolis students from low income families to attend suburban schools which are part of the West Metro Education Program, a consortium of school districts in the western metropolitan area.<sup>184</sup> Although the suburban program aspect was set to expire at the end of the 2004-05 school year, it has been extended voluntarily to the present day.

Despite the settlement, Minneapolis' schools remain highly segregated. In 2010-11, sixty-four percent of schools (75 of 117) in Minneapolis (including charter schools) had nonwhite enrollments exceeding eighty percent. Another six percent had enrollments that were more than eighty percent white. In 1995, when the NAACP case was brought, only twenty-three percent of schools were more than eighty percent nonwhite and only three percent were more than eighty percent white.

Several suburban districts have also been involved in school boundary decisions that have significantly increased racial segregation in their schools. The Hopkins School District, for instance, provides a good example of a School Board that tried to draw integrative school attendance boundaries but after receiving very little support from the State Department of Education, eventually settled for much less pro-integrative boundaries. The case involved decisions about how to distribute the students from the district's most diverse elementary school when it was closed.

The school board first proposed distributing many of the children of color from the school to the district's least diverse school. However, after very contentious public hearings and after receiving no clear guidance from the Minnesota Department of Education's office of integration/desegregation, the least integrative of the four options studied by the district was selected.

A case in Apple Valley actually included the use of a non-contiguous attendance area which resulted in the bussing of low-income minority students from manufactured housing park through less diverse, higher income areas to a lower-income school. In this case, although the Department of Education recognized that the attendance boundary was glaringly segregative and pushed the district to remedy the attendance boundary, the Department was unable to force the school district to act.<sup>185</sup>

The Osseo School District is a large, diverse district northwest of Minneapolis which includes racially diverse areas in Brooklyn Park and Coon Rapids, as well as largely white areas in Maple

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<sup>182</sup> Settlement Agreement at 1, Minneapolis Branch of the NAACP v. State, (Minn. Dist. Ct. 2000) (95-14800) & Lee Xiong v. State (Minn. Dist. Ct. 2000) (98-2816) (on file with author).

<sup>183</sup> Settlement Agreement ex. B.

<sup>184</sup> *Id.*

<sup>185</sup> See E-mail from Marceline Dubose to Cindy Jackson and Morgan Brown, Nov. 17, 2004, (stating that the school districts were in the process of "thinking about" attendance boundaries and that "their [the school district's] background analysis of the causes of the racial isolation is insufficient to say the least."); Letter from Morgan Brown, the Minnesota Department of Education, to Don Brundage and Jane Berenz, Independent District 196, Nov. 18, 2004 (stating that the Minnesota Department of Education had "additional concerns" about the Cedar Grove attendance boundary); email from Sharon Peck to Cindy Jackson, May 18, 2005 (containing District 196's unofficial school board update stating that the school district would begin the process of reviewing Cedar Park's attendance boundary next year and stating that "[w]e rarely get this sort of 'meaty' information in this type of email. (i.e. review of attendance boundaries).")

Grove. In recent years, the district has engaged in both boundary decisions and school location decisions that were highly controversial and which eventually contributed to racial disparities across the district's schools. The first case was a boundary change for elementary schools in 1999; the second involved determining the attendance areas for the district's high schools when a new building was opened in the least diverse part of the district; and the third arose when the closing of an elementary school building required that a magnet program serving a significant number of children of color be transferred to another building.

In all cases, the district evaluated multiple options and the decision process was dominated by highly contentious testimony in public hearings (one of which ran from 7:30 p.m. one evening until 4:30 a.m. the following morning). In the first two cases, the least integrative boundary options were chosen.<sup>186</sup> In the third, the magnet program was eventually moved as planned but only after an intense backlash, expensive legal proceedings, and ethics complaints brought against the Superintendent (which were eventually ruled to be unfounded).

In 2008, the Eastern Carver School District's Boundary Task Force recommended against a plan to redraw its high school boundaries to reflect racial diversity in the district. The revised boundary would have extended the Chaska High School boundary very slightly beyond the city of Chaska border. The decision meant that Chaska High School would continue to have a free-reduced price lunch eligibility rate more than twice the rate in Chanhassen High School. (This gap has widened since the decision.)

In 2010, the Bloomington School Board evaluated several alternative school boundary changes for its elementary schools. The options included two that would have decreased racial and income disparities across the ten elementary schools. The selected option was the one that did the least to decrease disparities. The selected option actually *increased* the free-reduced price eligibility rate in the district's poorest school from seventy-three percent to seventy-five percent. (The second highest poverty rate was 24 points lower under the selected plan.)

The Eden Prairie School District provides an example where racially integrated boundaries were successfully drawn (in 2010-11). However, the decision brought a great deal of racial controversy and, as in Osseo, the Superintendent was accused of ethics violations, cleared, but then pressured to resign anyway.

The "Fully Developed Suburbs Housing Report" submitted to the Met Council on July 15, 2013 argued that in order to effectively address these challenges. Housing and school policy are intimately linked and strategies must address both of these areas in order to succeed. Regrettably, the FHEA does not report or discuss the existing and readily available data regarding racial segregation, particularly rapidly growing racial segregation in public schools.

For the following reasons, the undersigned encourage the Met Council to coordinate its housing policy with the State Department of Education and local school districts within the metropolitan area.

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<sup>186</sup> See Utley, Maximilia, "Inequality in Minnesota Public School Education: Osseo School District's Boundary Decisions", unpublished 2007 for a full description of the processes.

### III. Incorporation by Reference of All My Other Comments

I incorporate by reference all of my comments to the State AI in 2011, to its Qualified Allocation plan and its modification, my letter to the Central Corridor Funders Collaborative, and my letter to the City of Minneapolis regarding its comprehensive plan. They are attached as the following appendices: Appendix 1 – Comments on 2011 Minnesota Analysis of Impediments to Fair Housing Choice (Draft Report for Public Review, December 14, 2011); Appendix 2 – Comments on the State of Minnesota Qualified Allocation Plan; Appendix 3 – Comments on the Possible Changes to the 2014 Qualified Allocation Plan (QAP); Appendix 4 – Comments on the Minneapolis FY 2012 Consolidated Plan for Housing and Community Development; and Appendix 5 – Comments on the Central Corridor Affordable Housing Coordinated Plan: Recommended Policies and Strategies.

### IV. The Metro Area Cannot Legally Revert to Prior Segregative Practices

From 1971 to 1983, the Met Council and the MHFA demonstrated that the state could operate a highly integrated regional housing program. This effort establishes a minimum definition of what the requirement of affirmatively further fair housing requires of Met Council and MHFA.<sup>187</sup> The State of Minnesota, Met Council, and MHFA could not in 1983 legally revert to racially segregative practices and cannot now perpetuate or intensify segregation in the region's schools and neighborhoods.

Sincerely,

Myron Orfield  
Professor of Law  
Director of the Institute on  
Metropolitan Opportunity

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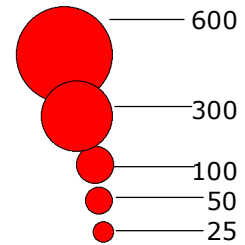
<sup>187</sup> See Letter from Robert F. Poffenberger, Director HUD Office of Community Planning and Development, Ind. State Office, to Gerry J. Sheub, President Lake Cnty. Bd. of Comm'rs (Apr. 18, 2000) (stating that when proven pro-integrative practices revert to segregative ones, the reversion constitutes a violation the Federal Fair Housing Act) (on file with the Institute on Metropolitan Opportunity).

## APPENDIX: Maps 1 – 8 and Table 1

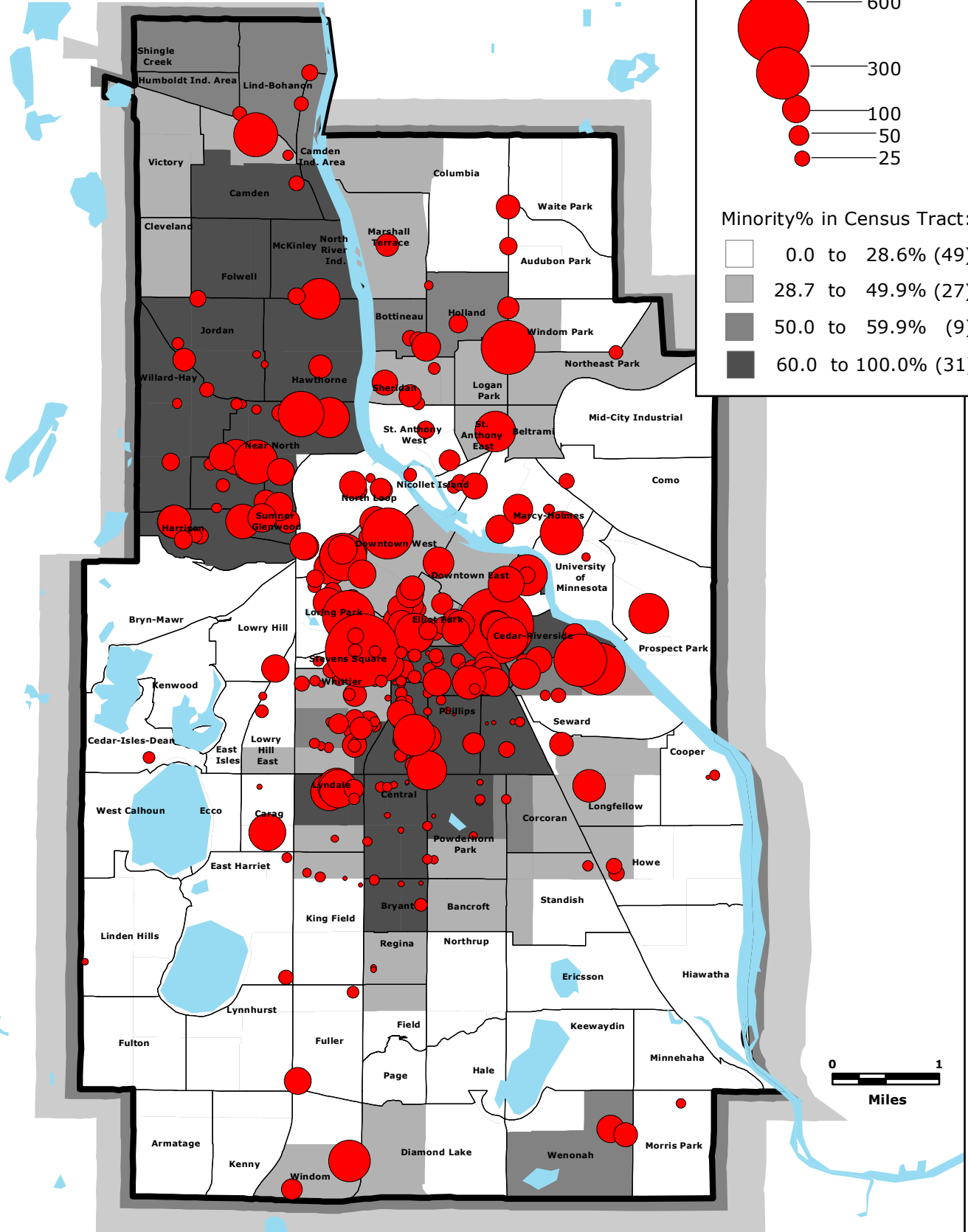
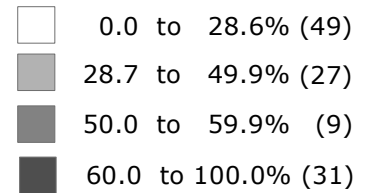
**Map 1: City of Minneapolis**  
**Number of Existing Affordable Units in All**  
**Subsidized Housing Sites placed through 2007**  
**and Percentage Minority by Census Tract, 2010**

**Legend**

Size of Circle =  
 Number of Affordable Units



Minority% in Census Tract:

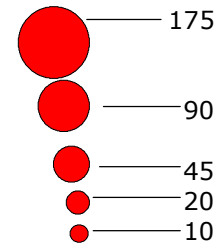


Data Sources: HousingLink, U.S. Census Bureau.

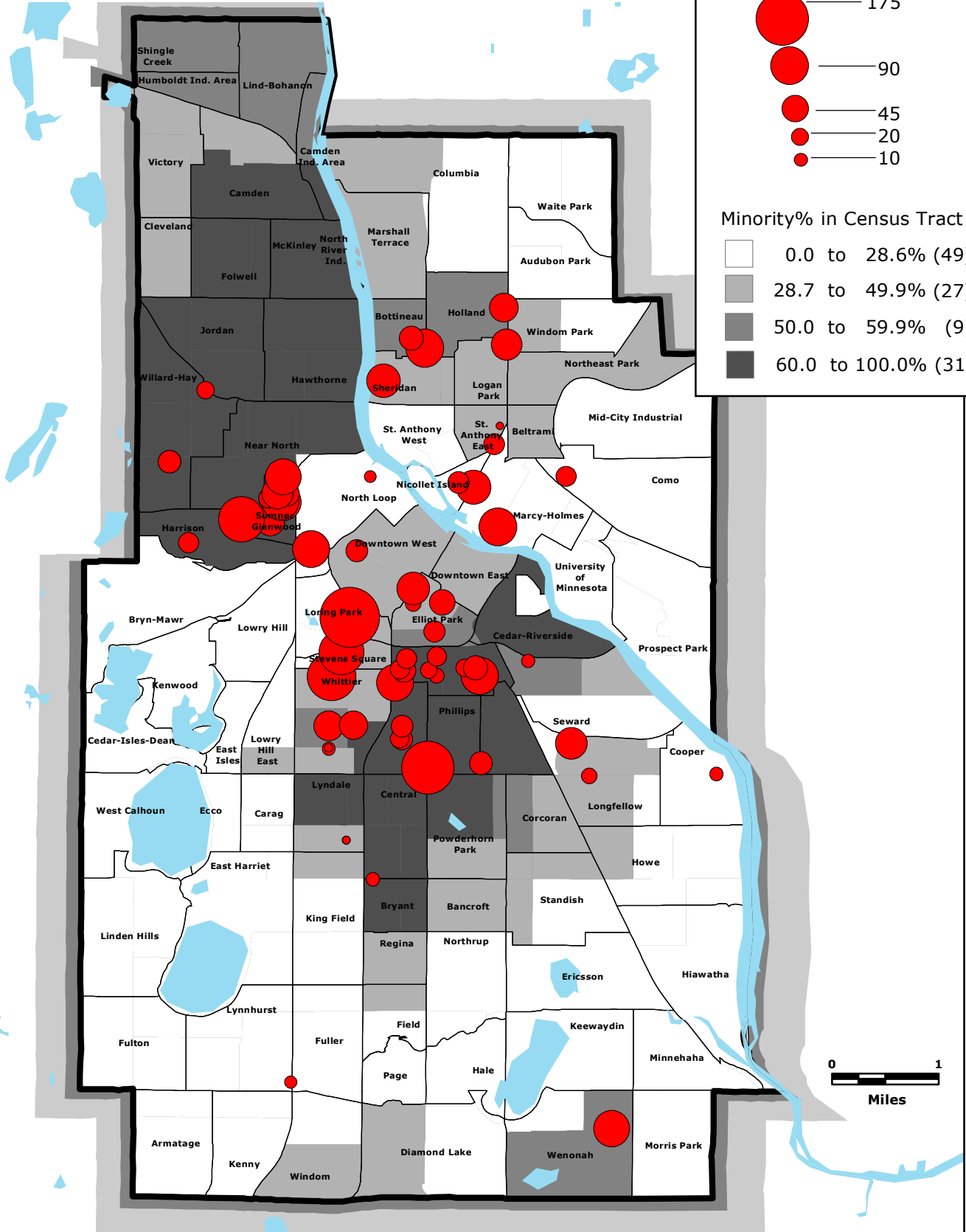
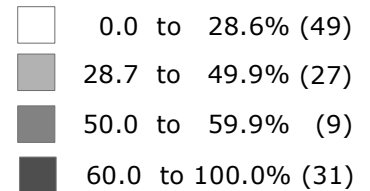
**Map 2: City of Minneapolis**  
**Number of Low Income Units in LIHTC**  
**Housing Sites placed by the end of 2009**  
**and Percentage Minority by Census Tract, 2010**

**Legend**

Size of Circle =  
Number of LIHTC Units



Minority% in Census Tract:



Data Sources: U.S. Department of Housing and Urban Development, U.S. Census Bureau.

**TABLE 1:****CITY OF MINNEAPOLIS****Number of People and Housing Units by Percentage Minority in Census Tracts**

	% Minority in Census Tracts (2010)		
	< 28.7%	>=28.7%	Total
Total Population (2010)*	178,892	203,691	382,583
Total Housing Units (2006-2010)**	83,240	83,901	167,141
Rental Housing Units (2006-2010)**	32,791	49,484	82,275
LIHTC (placed through 2009)***	593	2,791	3,384
Total Subsidized Existing Affordable Units (2007)****	2,548	15,333	17,881

**CITY OF MINNEAPOLIS****Share of Population and Housing Units by Percentage Minority in Census Tracts**

	% Minority in Census Tracts (2010)		
	< 28.7%	>=28.7%	Total
Total Population (2010)*	46.8	53.2	100.0
Total Housing Units (2006-2010)**	49.8	50.2	100.0
Rental Housing Units (2006-2010)**	39.9	60.1	100.0
LIHTC (placed through 2009)***	17.5	82.5	100.0
Total Subsidized Existing Affordable Units (2007)****	14.2	85.8	100.0

Sources:

\* U.S. Census Bureau, SF1

\*\* U.S. Census Bureau, American Community Survey

\*\*\* U.S. Department of Housing and Urban Development

\*\*\*\* HousingLink



**Map 3: Minneapolis Public Elementary Schools  
Race and Ethnicity, 2010-2011  
and Percentage Minority by Census Tract, 2010**

**Legend**

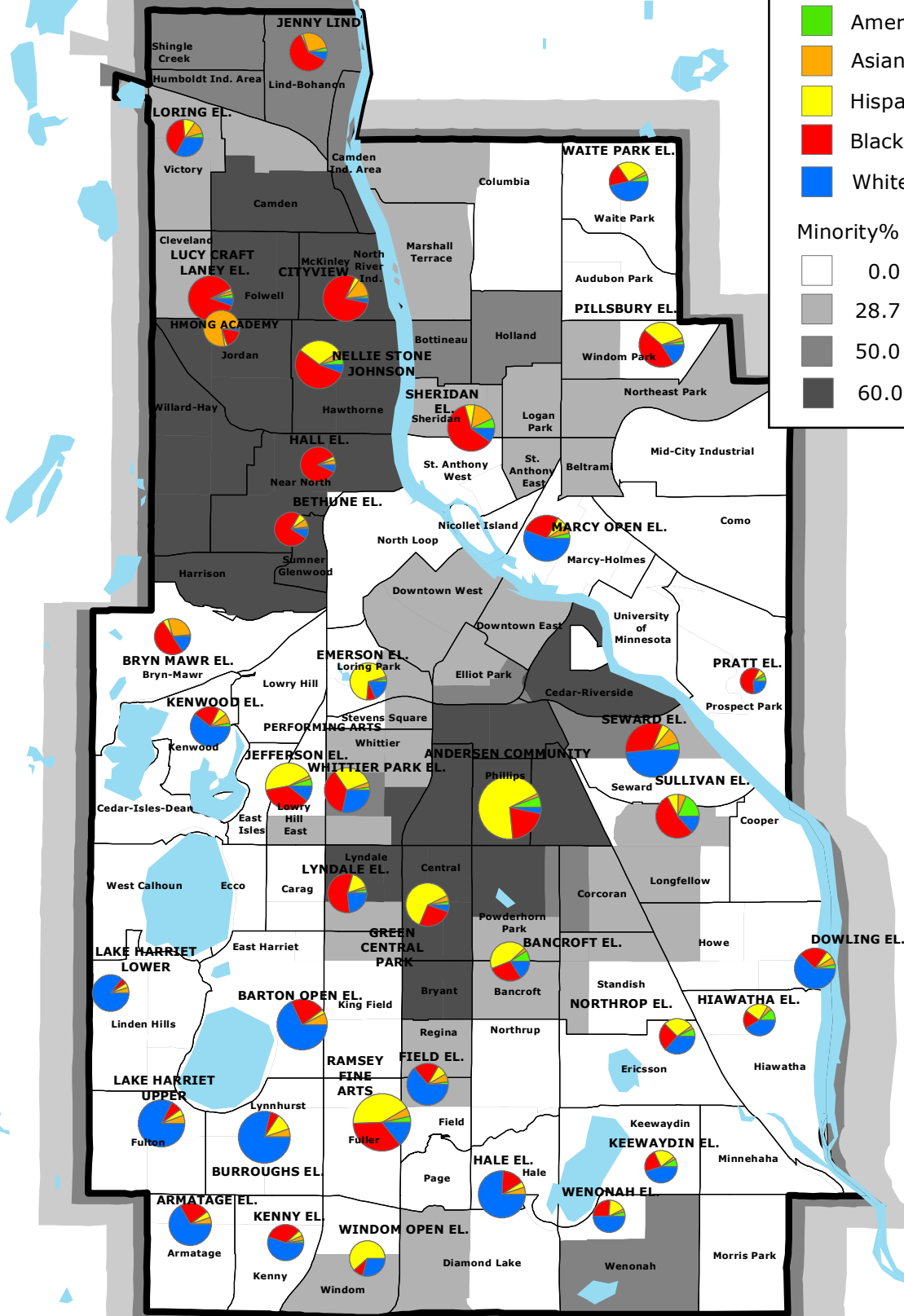


Scale:  
= 1,400  
Students

- American Indian
- Asian-Pacific Islander
- Hispanic
- Black
- White

Minority% in Census Tract:

- 0.0 to 28.6% (49)
- 28.7 to 49.9% (27)
- 50.0 to 59.9% (9)
- 60.0 to 100.0% (31)



0 1  
Miles

Data Sources: Minnesota Department of Education, U.S. Census Bureau.

**Map 4: Minneapolis Public Elementary Schools  
Lunch Status, 2010-2011  
and Census Tract Poverty Rate, 2006-2010**

**Legend**



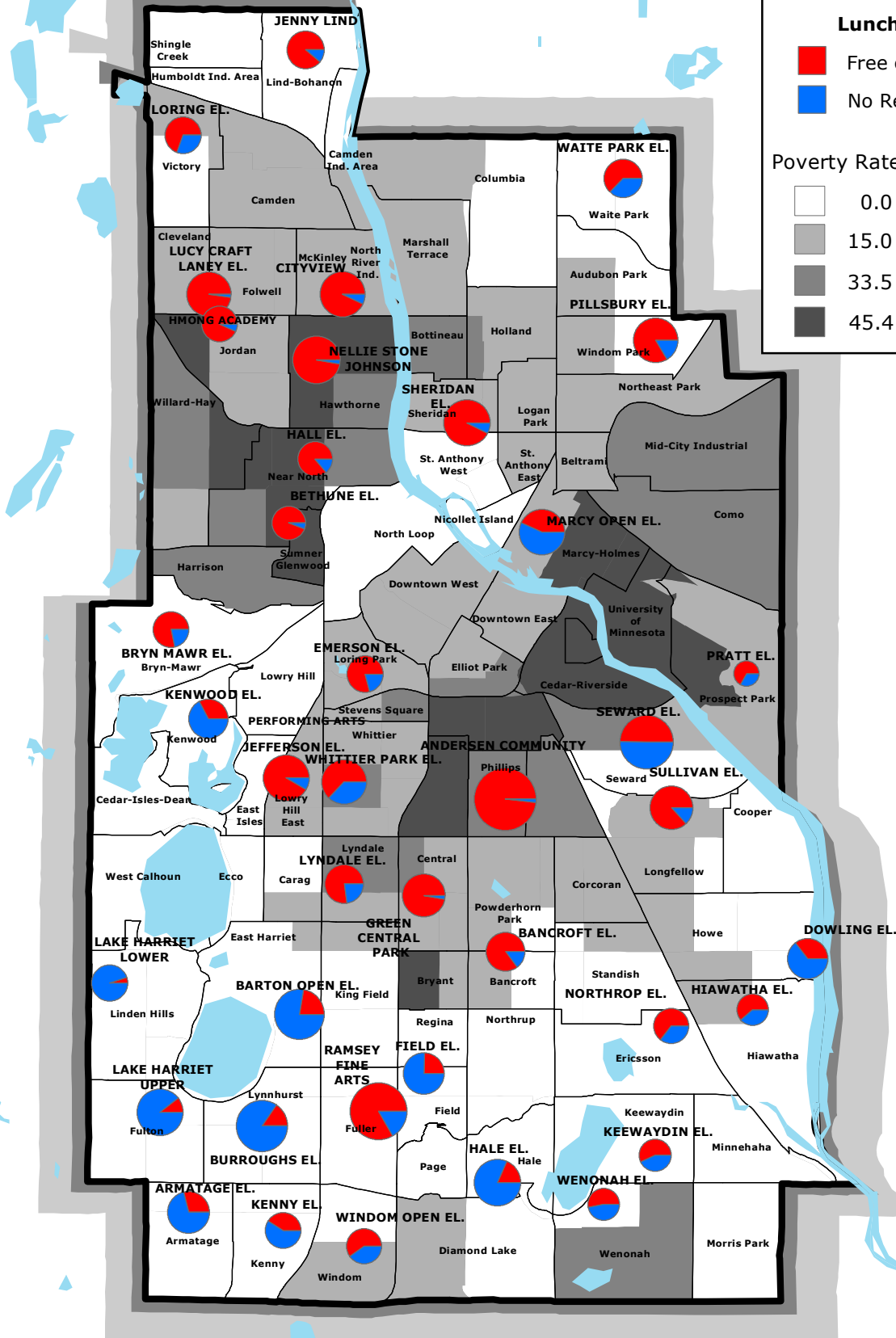
Scale:  
= 1,400  
Students

**Lunch Status:**

- Free or Reduced
- No Reduction

**Poverty Rate in Census Tract:**

- 0.0 to 14.9% (43)
- 15.0 to 33.4% (43)
- 33.5 to 45.3% (16)
- 45.4 to 100.0% (14)



0 1  
Miles

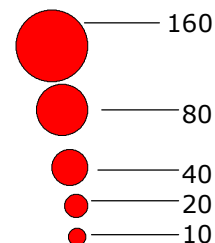
Data Sources: Minnesota Department of Education, U.S. Census Bureau, ACS.

# Map 5: City of Minneapolis Number of Subprime Loans, 2004-2006\* and Percentage Minority by Census Tract, 2010

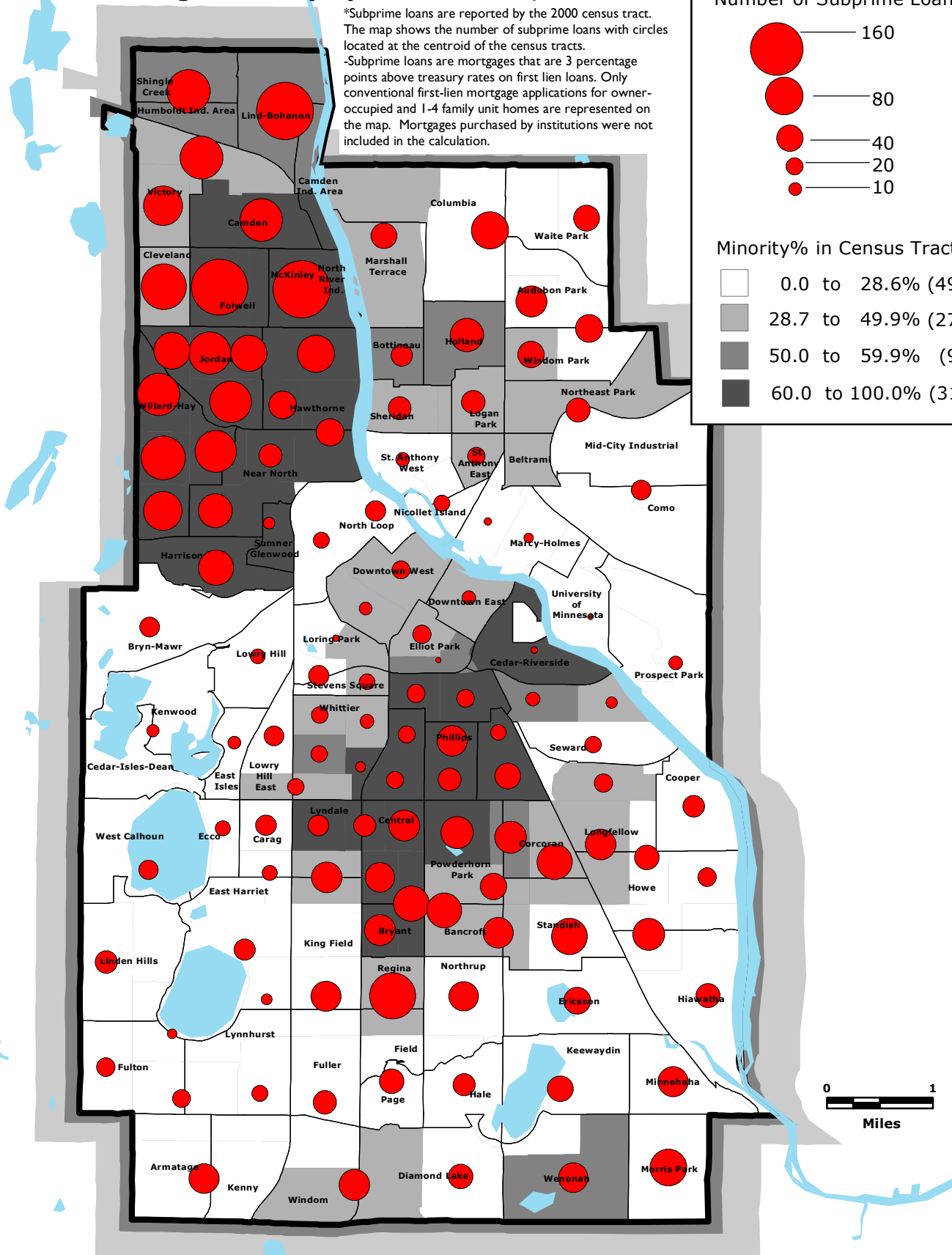
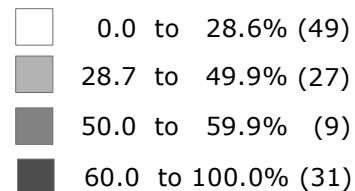
\*Subprime loans are reported by the 2000 census tract. The map shows the number of subprime loans with circles located at the centroid of the census tracts. Subprime loans are mortgages that are 3 percentage points above treasury rates on first lien loans. Only conventional first-lien mortgage applications for owner-occupied and 1-4 family unit homes are represented on the map. Mortgages purchased by institutions were not included in the calculation.

## Legend

Size of Circle =  
Number of Subprime Loans



Minority% in Census Tract:







Data Sources: Home Mortgage Disclosure Act Data, U.S. Census Bureau.

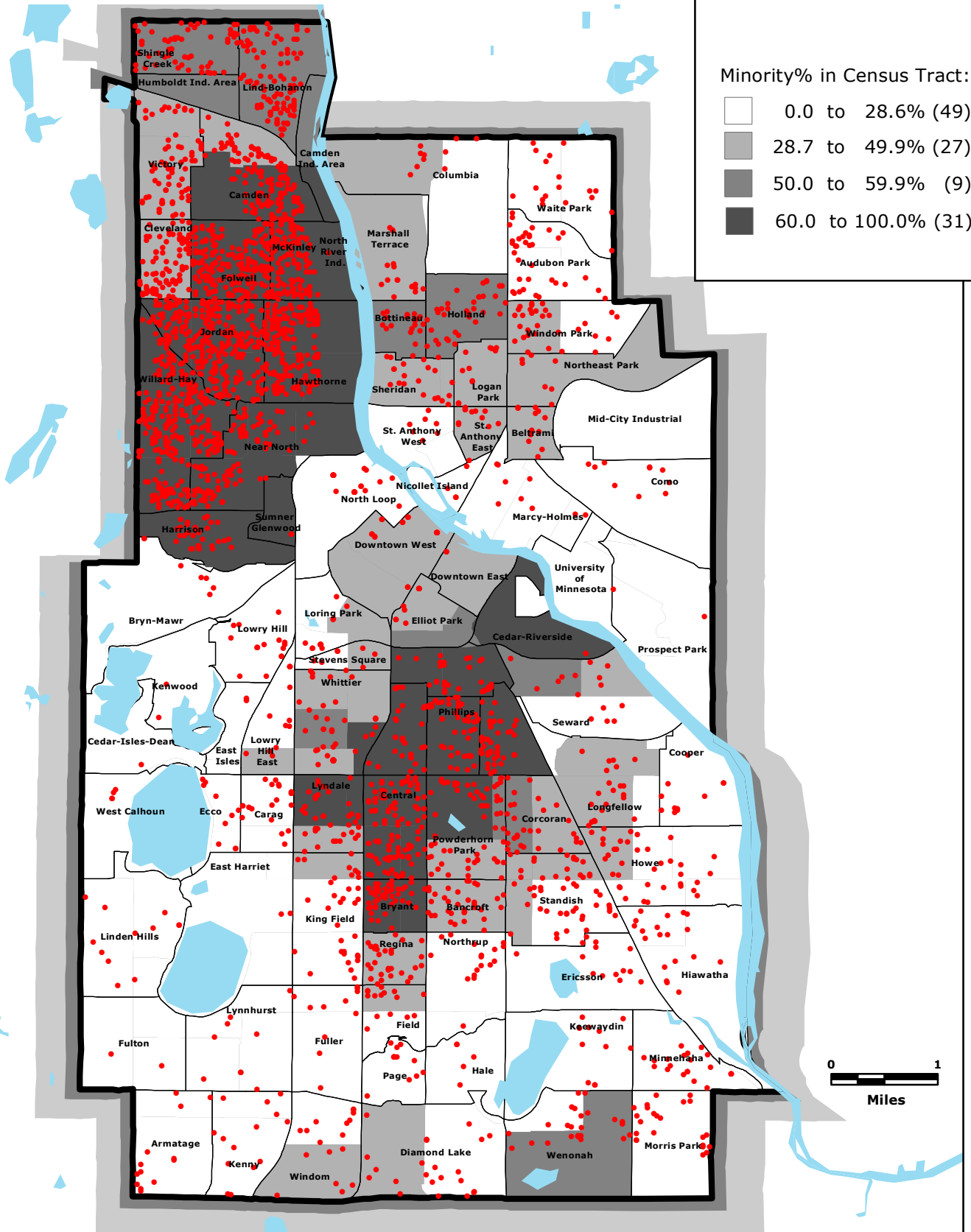
**Map 6: City of Minneapolis  
Foreclosures-Sherriff's Sales in 2007  
and Percentage Minority by Census Tract, 2010**

**Legend**

1 dot =  
Sherriff's Sale

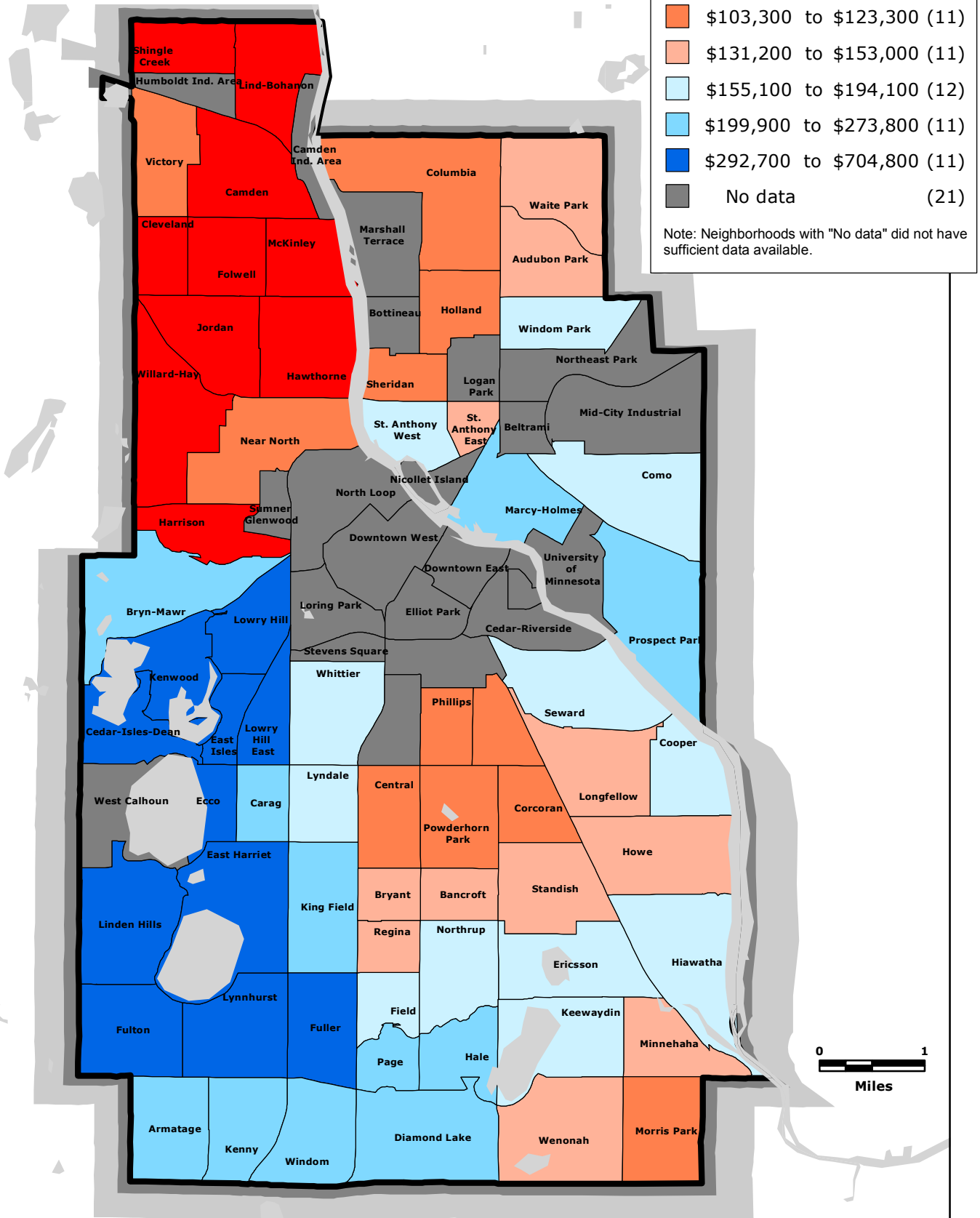
Minority% in Census Tract:

	0.0 to 28.6% (49)
	28.7 to 49.9% (27)
	50.0 to 59.9% (9)
	60.0 to 100.0% (31)



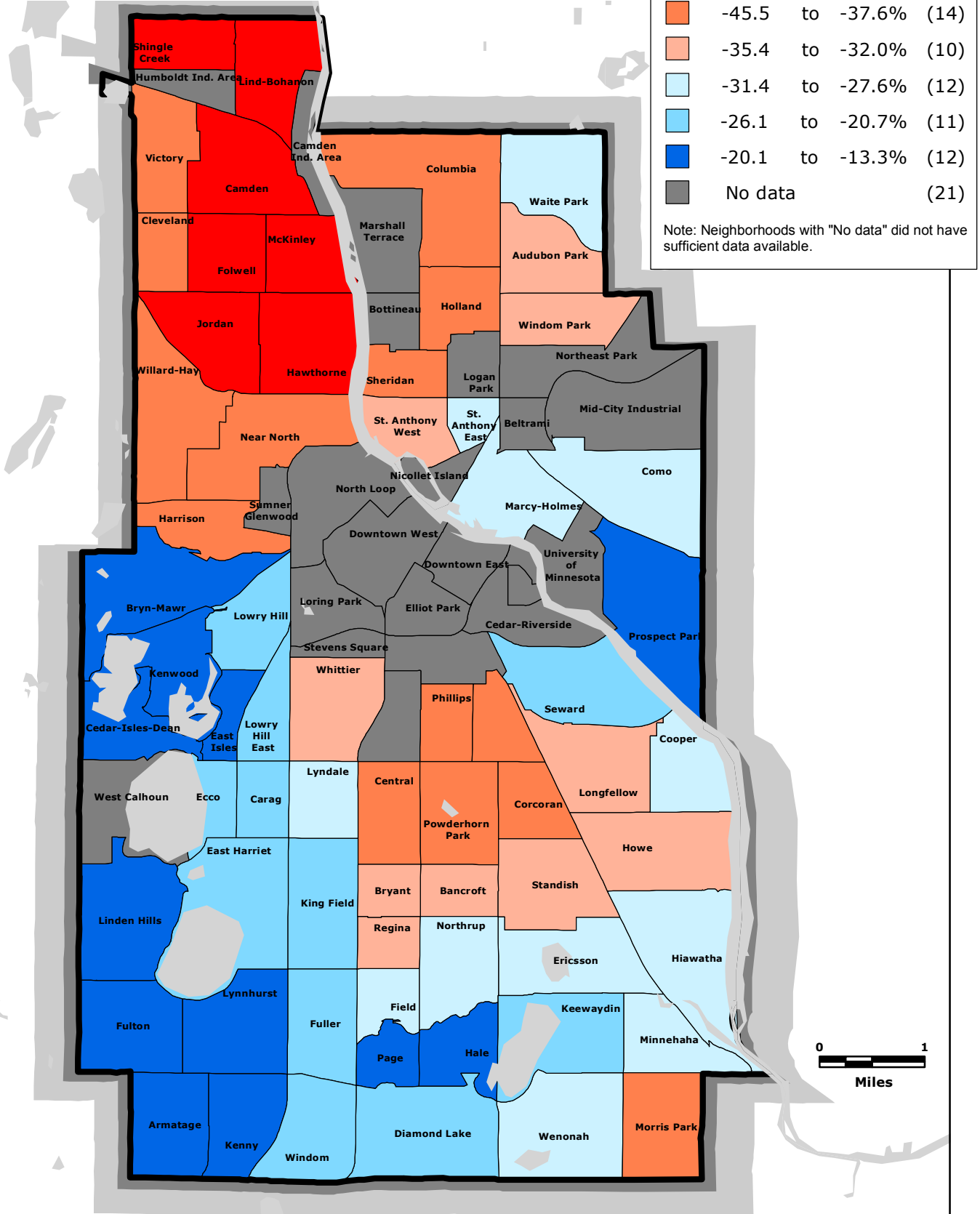
Data Sources: Hennepin County Sheriff's Department, U.S. Census Bureau.

**Map 7: City of Minneapolis  
Value of Single Family Homes in Dollars  
by City Neighborhood January, 2012**



Data Source: Zillow.

**Map 8: City of Minneapolis  
Percentage Change in the Value of Single Family  
Homes in Dollars by City Neighborhood  
January 2006 to January 2012**



Data Source: Zillow.

## Appendix III: IMO Comments on FHEA Second Draft

Ms. Libby Starling  
Director of Research  
Twin Cities Metropolitan Council

February 28, 2014

Re: Comments on the Second Draft FHEA

Dear Ms. Starling:

The Second Draft Fair Housing Equity Assessment (“DFHEA”) did not analyze the HUD-provided data completely and seriously. While it noted growing residential segregation and its harms, the DFHEA neither discussed how state and local housing policies caused this segregation nor described the effect of this housing policy on increasing school segregation—a reciprocal driver of housing segregation. As such, the report is not a meaningful consideration of the data and its implications for the region. By excluding pro-integrative civil rights groups from its many relevant committees, the Twin Cities Metropolitan Council (“Met Council”) did not seriously engage regional stakeholders.

Because the document’s few action steps clearly intensify and perpetuate racial segregation—most notably by urging even more affordable housing in segregated and re-segregating neighborhoods—it does not provide a clear pathway toward holding the region accountable for its Fair Housing Equity Assessment (“FHEA”) deliberations. FHEA activities will be meaningful and consequential to the region only in a negative sense because they will ignore or justify discriminatory behavior of public agencies and private parties. To help provide a clearer pathway to regional accountability, my letter concludes by outlining important data and metrics for monitoring stable, metropolitan-wide racial integration.

## I. Overview

The Met Council is a recipient of federal housing funds. It has a duty to refrain from perpetuating segregation and an obligation to affirmatively further fair housing. It has a legal obligation to use its power to replace segregated neighborhoods with integrated neighborhoods. Because its housing construction programs and land-use plans must increase racial integration, it clearly cannot operate or support programs and plans that perpetuate segregation. The Met Council is clearly failing in all these duties, and this draft FHEA shows that it intends to move even further away from its legal obligations.

An FHEA is based on the requirements of an Analysis of Impediments (“AI”). An AI reviews impediments to fair housing choice in the public and private sector and involves:



1. An extensive review of State or Entitlement jurisdiction's laws, regulations, and administrative policies, procedures, and practices[;]
2. An assessment of how those laws affect the location, availability, and accessibility of housing[;]
3. An evaluation of the conditions, both public and private, affecting fair housing choice for all protected classes[; and]
4. An assessment of the availability of affordable, accessible housing in a range of unit sizes.<sup>1</sup>

HUD defines the Met Council's obligation "to affirmatively further fair housing" as requiring it to:

1. Conduct an analysis to identify impediments to fair housing choice within the jurisdiction[;]
2. Take appropriate actions to overcome the effects of any impediments identified through the analysis[; and]
3. Maintain records reflecting the analysis and actions taken in this regard.<sup>2</sup>

HUD interprets those broad objectives to mean:

1. Analyze and eliminate housing discrimination in the jurisdiction[;]
2. Promote fair housing choice for all persons[;]
3. Provide opportunities for inclusive patterns of housing occupancy regardless of race, color, religion, sex, familial status, disability and national origin[;]
4. Promote housing that is structurally accessible to, and usable by, all persons, particularly persons with disabilities[; and]
5. Foster compliance with the nondiscrimination provisions of the Fair Housing Act.<sup>3</sup>

## II. The Draft Fails to Discuss the Abandonment of Met Council Policy 39

The most conspicuous failure of the DFHEA is its failure to discuss the Met Council's abandonment of its effective fair housing Policy 39, which was enforced from 1971 to 1986. The draft obliquely acknowledges that Project-based Section 8 units were placed in a much more pro-integrative manner than the low-income housing tax credit ("LIHTC") units.<sup>4</sup> However, the DFHEA does not relate this pro-integrative placement to Policy 39; it never even mentions that Policy 39 remains law, yet the Met Council does not enforce it. I discussed this Policy 39's history in my previous comments and also have published a law review article that outlines its effectiveness.

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<sup>1</sup> HUD, Fair Housing Planning Guide § 2-7, *available at* <http://www.hud.gov/offices/fheo/images/fhpg.pdf> (numbering added).

<sup>2</sup> *Id.* § 1-2 (numbering original).

<sup>3</sup> *Id.* § 1-3 (numbering added).

<sup>4</sup> DFHEA IV, at 10-1, 15-8.

### III. The Report Fails to Cite the Placement of Affordable Housing as a Discriminatory Driver of Racial Segregation

The DFHEA notes in several places that particular affordable housing programs incent placement of affordable housing in poor neighborhoods. It notes that suburban opposition makes it difficult to place LIHTC units in white neighborhoods, but does not note that the Minnesota Housing Finance Agency (“MHFA”) frequently turns down requests for affordable housing in predominantly white neighborhoods. Between 2005 and 2011, the agency turned down \$23 million of requests from these neighborhoods. The report does not note that the agency gives over 150 points to projects likely to be in racially segregated neighborhoods and only 10 points for projects likely to be in high-opportunity white neighborhoods. It does not mention the legislative creation of central city sub-allocators for the tax credit, the legislature’s decision to dedicate most of the units to the central cities, or the central cities’ extraordinarily segregated placement of these units. By law the DFHEA must extensively review all of these “laws, regulations, and administrative policies, procedures, and practices” that create barriers to integrated housing.<sup>5</sup> On the contrary, the first draft of the DFHEA shockingly concluded:

The reality that the most logical places for affordable housing investment are more likely to be in an RCAP [Racially Concentrated Area of Poverty] than not exposes the complexity of the nature of the disparities reflected in this report – the very policies and investment decisions that are meant to provide housing opportunities for low and moderate income families also contribute to the geographic disparities and concentration of poverty the can perpetuate the lack of upward mobility.<sup>6</sup>

Although this statement was removed in a subsequent draft, the fact that it made it into the initial draft is telling. The initial assertion (that RCAPs are the “logical” place to put new subsidized housing) demonstrates how distorted views on this issue have become at the Met Council. The rest of the statement implies that the segregative outcomes that one sees in the region are simply the result of this unfortunate “reality” (that RCAPs are the “logical” place to put subsidized housing), ignoring the purposeful behavior by the legislature and other public agencies that contributes greatly to the problem.

This treatment also ignores evidence that developing low-income housing in the developing suburbs is much more cost-effective than building units in poor, segregated neighborhoods. Recent analysis of comprehensive data shows that suburban subsidized housing units are thirty to forty percent cheaper per square foot and often have lower rents.<sup>7</sup>

The DFHEA notes that only twelve percent of low-income households, and only eight percent of minority households, use transit to commute to work. Despite this, Met Council policies and the DFHEA put a great deal of emphasis on transit availability when evaluating where to put affordable housing. This emphasis inevitably concentrates low-

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<sup>5</sup> Fair Housing Planning Guide, *supra* note 1, § 2-7.

<sup>6</sup> DFHEA VII, at 3 (emphasis added).

<sup>7</sup> Inst. on Metro. Opportunity, Reforming Subsidized Housing Policy in the Twin Cities to Cut Costs and Reduce Segregation (Jan. 2014), *available at* <http://www.law.umn.edu/uploads/ee/52/ee52be92915228d3a453e5428ea40c07/Subsidized-Housing-in-the-Twin-Cities-1-7-14.pdf>.

income housing in segregated neighborhoods in the core of the region. How does this benefit the vast majority of those living in subsidized housing who have cars, but must use them to go long distances to get to the entry-level jobs that are often in the developing suburbs where job growth is most robust?

The DFHEA notes that while both subsidized housing and the urban non-white population are located closest to the largest clusters of employment, it makes clear that these same urban poor experience the highest levels of unemployment for those living in subsidized housing (and for non-whites generally). The DFHEA suggests this reflects the fact that high concentrations of urban jobs in the central business district and city job centers have skill sets too high for the residents of poor segregated neighborhoods, areas with the region's worst schools and graduation rates.

Incredibly, the DFHEA uses the very small transit-dependent population and the proximity to jobs, for which low-income residents do not have the skills to acquire, to wrongly justify their blatantly segregative placement of affordable units in RCAPs. The DFHEA never mentions the fact that most new, low-skilled jobs are located in an un-clustered pattern in developing suburbs.

Consistent with this, Met Council staff supported the idea that job growth should be excluded from the job access measure used in the opportunity analysis. This decision guaranteed that the measure would overstate the scores for central locations near to the central business districts (where the analysis admits that most jobs are not well-matched to subsidized housing residents).

#### IV. The Report Fails to Report that the Met Council Abandonment of its Oversight of Exclusionary Zoning as a Driver of Racial Segregation

The DFHEA notes at several places that exclusionary zoning and “NIMBYism” are a problem,<sup>8</sup> but fails to note that the Met Council has power under the Land Use Planning Act (“LUPA”) to require communities to eliminate exclusionary zoning in order to provide for their fair share of affordable housing. It does not mention that from 1970 to 1986 the Met Council effectively guided a huge amount of land to multifamily use<sup>9</sup> and then for no good reason allowed most of that land to revert to large, exclusionary single family lots.<sup>10</sup> Professor Edward Goetz concluded that the Met Council stopped monitoring whether local zoning matched comprehensive plans and quietly allowed the communities he studied to rezone seventy-eight percent of the land designated as high-density for affordable housing to other uses. Overall, Goetz concluded that

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<sup>8</sup> DFHEA IV, at 18–9.

<sup>9</sup> Edward G. Goetz, Karen Chapple & Barbara Lukermann, *The Minnesota Land Use Planning Act and the Promotion of Low- and Moderate-Income Housing in Suburbia*, 22 L. & INEQ. 31, 31–72 (2004).

<sup>10</sup> *Id.* According to Goetz, had this acreage remained high density, 104,733 housing units could have been built. By 2001, these parcel of land would accommodate only 46,000 hundred fifty-two units a staggering fifty-six percent reduction in residential development potential. These calculations use the maximum possible units under zoning designations. This means a potential 58,618 units were lost on these parcels. In particular some communities have changed their zoning plans or plan designation of this land quite extensively or perhaps never updated their zoning maps to conform to their comprehensive plans: just thirteen communities account for more than ninety-nine percent of the lost units. *Id.*

approximately thirty-eight percent of the acreage designated for high-density development had been re-designated for low- or medium-density residential development. An additional sixteen percent had been re-designated for planned unit developments (“PUDs”) at indeterminate densities, and seventeen percent was re-zoned for nonresidential use. Only twenty-two percent of the acreage originally guided for inclusionary development remained in place.<sup>11</sup> The Met Council has an unparalleled database concerning the zoning and comprehensive planning of local communities, but nowhere is this data analyzed in the DFHEA.

V. The Draft Fails to Comment on the Segregative Effect of Housing Policies on Public Schools and on Growing School Segregation as a Driver of Housing Segregation

School capital plans are under the Met Council’s supervision. For purposes of the LUPA (which the Met Council administers) school districts are local governments. And while the legislature has asked the Met Council to help the Department of Education implement the school desegregation rule by coordinating its housing policy therewith, the DFHEA nowhere discusses that metropolitan area schools have become rapidly segregated and that this school segregation is reciprocally related to the region’s increasing housing segregation.

The Fair Housing Act requires HUD and its grantees to consider the racial balance of schools attended by government-supported housing recipients. The clear implication of this legal requirement is that stably integrated schools are a central component of fair housing policy.

On February 23, 2010, Secretary Shaun Donovan clarified HUD’s fair housing priorities before Congress, stating:

[S]ustainability also means creating “geographies of opportunity,” places that effectively connect people to jobs, *quality public schools*, and other amenities. Today, too many HUD-assisted families are stuck in neighborhoods of concentrated poverty and segregation, where one’s zip code *predicts poor educational*, employment, and even health outcomes. These neighborhoods are not sustainable in their present state.<sup>12</sup>

When the legislature authorized a metropolitan school desegregation rule, it required the Department of Education to “consult with the Metropolitan Council to coordinate school desegregation efforts with the housing, social, economic, and infrastructure needs of the metropolitan area.”<sup>13</sup> The Minnesota Legislature has also facilitated the creation of three

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<sup>11</sup> *Id.*

<sup>12</sup> Press Release, HUD, Written Testimony of Shaun Donovan: FY2011 Budget Request for HUD (Feb. 23, 2010) (emphasis added), *available at* <http://portal.hud.gov/hudportal/HUD?src=/press/testimonies/2010/2010-02-23> (emphasis added).

<sup>13</sup> MINN. R. 3535. *See also* 1994 Minn. Laws, Ch. 647, Art. 8(2)(1)(c).

large city-suburban integration school districts to facilitate and coordinate, in consultation with the Met Council, more integrated schools on a metropolitan basis.<sup>14</sup>

School data for the Twin Cities shows a dramatic increase in racial isolation. In 1995, there were only fifteen elementary schools and four middle/high schools with more than seventy-five percent of their students non-white. By 2011, the number of elementary schools in this group had increased six times (to ninety schools) and by ten times for middle/high schools (to forty schools).<sup>15</sup>

Segregation in schools and neighborhoods are closely related. Segregated neighborhoods, of course, generate segregated neighborhood schools, but there is also feedback from school characteristics to neighborhoods. Potential residents, especially families with children, evaluate local schools when deciding where to live. This means that racial or social transition in schools—and the record shows that schools can change character very rapidly—can accelerate neighborhood transition. Indeed, racial change in schools is very often the precursor to neighborhood change. By the same token, stably integrated schools can stabilize neighborhoods.

According to statute, the Met Council “shall adopt a development guide” that “will encompass the physical, social and economic needs of the metropolitan area and those future developments which will have an impact on the entire area” including “the location of *schools*.”<sup>16</sup> LUPA states that for purposes of Chapter 473 “local government unit” means “school district”<sup>17</sup> and the Met Council is required to provide notice of rule changes and related hearings to all school districts in the metropolitan area.<sup>18</sup> The law further requires the Met Council to “construct an inventory” of all schools in the metropolitan area and the unused space within each school.<sup>19</sup> The Met Council may submit its comments to the commissioner of education on any school district facility that is proposed in the metropolitan area.

LUPA requires that a local government unit’s comprehensive plans contain a statement on “the effect of the plan on affected school districts”<sup>20</sup> and these comprehensive plans must be submitted to the affected school district for review and comment six months prior to their submission to the Met Council.<sup>21</sup> Finally, it suggests that these comprehensive plans contain an intergovernmental coordination process for

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<sup>14</sup> For information on the three integration school districts, *see* West Metro Education Program (WMEP), available at <http://sites.google.com/a/wmep.k12.mn.us/wmep-k12-mn-us/>; East Metro Integration District (EMID), available at <http://www.emid6067.net/>; and Northwest Suburban Integration District (NWSID), available at [http://www.nws.k12.mn.us/About\\_NWSISD.html](http://www.nws.k12.mn.us/About_NWSISD.html).

<sup>15</sup> All calculations include only traditional elementary and secondary schools (and not Area Learning Centers, for instance) with more than fifty students.

<sup>16</sup> MINN. STAT. § 473.145 (2013) (emphasis added).

<sup>17</sup> *Id.* § 473.121(6); MINN. STAT. § 473.852(11) (2012) (stating that “school district” has the meaning given by MINN. STAT. § 120A.05).

<sup>18</sup> MINN. STAT. § 473.174(5) (2012).

<sup>19</sup> *Id.* § 473.23(1).

<sup>20</sup> *Id.* § 473.859(1).

<sup>21</sup> *Id.* § 473.858(2).

cooperation with school districts generally and the siting of public schools in particular.<sup>22</sup> LUPA contains four additional references to schools.<sup>23</sup>

The Met Council ignores the implications of the education data, even though it is clearly part of their duty under the Fair Housing Act and even though all of the FHEA material and webinars state this analysis of school segregation must be part of the FHEA. The DFHEA spends several pages detailing poor outcomes in the schools in the RCAPs<sup>24</sup> and the negative life-long effects of exposure to these schools, yet (the first draft of Section VIII) tellingly concludes that “affordable housing in proximity to excellent schools but not to transit or jobs is not a smart investment of limited resources.”<sup>25</sup> Neither draft cites evidence to support this proposition.

The Met Council’s own data notes that only twelve percent of the residents of subsidized housing use transit. Moreover, the DFHEA fails to note that residents of subsidized housing in high-opportunity areas are much more likely to be employed and have higher wages because of the proximity to suitable, unfilled jobs. The report fails to note that good schools and freedom from crime were the most important issues cited by residents of low-income housing in a state government survey of preferences;<sup>26</sup> that RCAPs have the lowest-performing schools and highest levels of crime; or that predominantly white, high-opportunity suburbs have the highest-performing schools and the lowest crime. The report fails to note that subsidized housing in high-opportunity suburbs have the longest waiting lists of any subsidized housing. And finally, it fails to note evidence that building new subsidized housing actually costs less in suburbs than comparable units in the central cities.

Thankfully, the statement that affordable housing near excellent schools is a bad investment was edited out of the second draft of Section VIII of the DFHEA. However, it is also true that the very short and wholly inadequate sub-section on schools that was included in the first draft was removed entirely from the second draft, showing a continuing lack of concern about this issue.

## VI. The Draft Recommends No Steps to Counter Mortgage Lending Discrimination

The DFHEA details evidence of mortgage lending discrimination that ranks among the most severe in the nation, but it has no clear action steps to respond to this discrimination.

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<sup>22</sup> *Id.*

<sup>23</sup> MINN. STAT. § 473.3875 prioritizes transit for livable communities grants to evaluate projects coordinating school and public transportation. MINN. STAT. §473.625 discusses the process of detaching airport land from school districts, MINN. STAT. §473.629 addresses proper valuation of property for bond issues by school districts, and MINN. STAT. §473.661 covers airport noise mitigation resources for school districts.

<sup>24</sup> DFHEA VI, at 15–20.

<sup>25</sup> DFHEA VII, at 3.

<sup>26</sup> MHFA, “Housing Location Preferences of Minnesotans” (Feb. 2012), *available at* [http://www.mnhousing.gov/idc/groups/administration/documents/document/mhfa\\_012251.pdf](http://www.mnhousing.gov/idc/groups/administration/documents/document/mhfa_012251.pdf).

## VII. The Draft Recommends No Steps to Counter Illegal Racial Steering

The DFHEA reports that steering is a problem and causes schools and neighborhoods in the region to become more segregated, but it lists no clear action steps in response.

## VIII. The Draft Gives So-Called Neutral Racial Preferences Too Large a Role in Creating Residential Segregation

The DFHEA gives undue weight to the different residential preferences of whites and non-whites as causes of segregation. While both whites and non-whites desire to live in integrated neighborhoods, an ideal integrated neighborhood for whites has a larger percentage of whites than the ideal neighborhood for non-whites.<sup>27</sup> Yet, it is critical to understand that these preferences, for both whites and non-whites, have been shaped by existing and past discrimination. It is likely that whites and non-whites may feel uncomfortable living with each other because our segregated society has given us little experience of doing so. Moreover, non-whites may not prefer to live in very white neighborhoods because they anticipate that discrimination of some kind by whites will lower their quality of life.<sup>28</sup> Because of both steering and segregated living patterns, there is asymmetry between whites and non-whites in terms of information about neighborhoods. Non-whites might seek whiter neighborhoods if they had better information on school quality and the stability and equity growth of residential property values in whiter neighborhoods.

Whites may have low tolerance for diversity simply because of invidious racial bias that should not be sanctioned. Alternatively, practices like steering, mortgage-lending discrimination, unfair subsidized-housing placement, and discriminatory school-boundary drawing often place diverse neighborhoods in the midst of racial transition and disinvestment, which may also reduce whites' tolerance for racial diversity.

In the end, if discrimination were eliminated—or reduced—and integration could become both more common and more stable, it is likely that preferences would change and become more compatible.

## IX. The Draft Fails to Note the Undue Influence of the Community Development Corporations in Shaping its Segregative Corridor Plans and the DFHEA

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<sup>27</sup> See, e.g., Keith R. Ihlanfeldt & Benjamin Scafidi, *Whites' Neighborhood Racial Preferences and Neighborhood Racial Composition in the United States: Evidence from the Multi-City Study of Inequality*, 19 HOUS. STUD. 325–59 (2004); Mary Pattillo, *Black Middle Class Neighborhoods*, 31 ANN. REV. SOC. 321 (2005); Lincoln Quillian, *Why is Black-White Residential Segregation So Persistent?: Evidence on Three Theories from Migration Data*, 31 SOC. SCI. RES. 31 197–229 (2002); Camille Zubrinsky Charles, *Can We Live Together? Racial Preferences and Neighborhood Outcomes*, in THE GEOGRAPHY OF OPPORTUNITY; Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOC. 167–207 (2003).

<sup>28</sup> See JOE FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* (1995).

The report fails to note the disproportionate influence of housing developers who have dominated the Corridor Planning and DFHEA process and the Met Council's decision-making. In 2011, the last year for which data is available, the Metropolitan Consortium for Community Developers ("MCCD") members had combined expenses of \$178,111,075. They have many lobbyists bolstered by hundreds of employees and advocates whose very livelihood depends on the continuation of current housing development patterns (which are so highly segregative). These groups dominate Met Council advisory committees while traditional civil rights groups advocating for integrated housing are absent or badly under-represented. A majority of the Corridor of Opportunity Board, and its successor the Partnership for Regional Opportunity, which is shaping metropolitan housing policy, is composed largely of developers of affordable housing who do almost all of their work in the central cities in a racially segregated context and no one with a civil rights perspective. LISC is the principle consultant for the Central and Southwest Corridor housing plan. LISC focuses overwhelmingly on central cities and operates a large number charter schools nationally (with over 78,000 students) that are nearly all segregated. This pattern is hardly representative of a region where more than half of the people of color live in suburbs and the overwhelming majority desire to live in integrated neighborhoods.

X. Stable Metropolitan Racial Integration: The Goal of Regional Fair Housing Planning

A. Requirement to Map Stable Metropolitan Racial Integration ("SMRI") Community Types

The Metropolitan Housing Plan must map SMRI community types, namely (1) areas of minority concentration, (2) racially-mixed areas, and (3) high-opportunity communities. The Met Council must in turn require fair housing plans from all covered communities that reflect SMRI category types.

B. Data and Metrics

The state is required to maintain consolidated plans monitoring trends by collecting data on and mapping (where possible) the characteristics of the aforementioned SMRI community types. The SMRI categories roughly correspond to the DFHEA's green, yellow, and blue regions.

The Met Council should in turn require fair housing plans from all housing allocators and entities, and these housing plans should monitor characteristics consistent with SMRI community types. These should include metrics and data for schools and neighborhoods regarding racial mix, income, student performance, housing characteristics, housing finance, crime, health, local fiscal capacity, jobs, and job growth.

The monitoring should include the following metrics, data and mapping (where applicable):

1. Data and maps showing the distribution of the community types:



- a. Areas of Minority Concentration – Census tracts with more than fifty percent non-white residents.
  - b. Racially Mixed Area – Areas with no minority group exceeding fifty percent of the population and a white share of at least thirty percent.
  - c. High-Opportunity Communities – Communities with higher-than-average values for income, jobs per resident in the community or nearby, job growth in the community or nearby, tax base per capita, and stable racial and income mixes.
2. Data and maps showing the regional distribution of:
    - a. School data showing the racial mix, economic composition, and test results of all elementary schools and their catchment areas. This data is available from the National Center for Education Statistics and State Departments of Education.
    - b. The placement of subsidized housing under HUD Section 8 and Low-Income Housing Tax Credit programs, broken out by the community types.
    - c. Basic health data, including at a minimum the incidence of asthma and other income-related diseases.
    - d. Municipal tax base data showing the ability of local governments to finance local public services from the legally available local taxes (which vary from state to state).
    - e. Jobs per capita and job growth, available in most states from the Local Employment Dynamics Database.
    - f. Location of luxury housing, defined, for example, as housing valued in the top twenty percentiles in the region.
    - g. Credit availability, defined, for example, as areas with the greater than average use of high quality credit (from HMDA data).
  3. Maps showing the region's framework of stable integration and how they relate to information in Sections 1 and 2.

#### C. AI Requirements Based on SMRI Community Type

##### 1. Category 1 Communities – Areas of Minority Concentration (Green Area)

In areas of minority concentration, housing plans must include a presumption against siting additional low-income family housing in these areas. In this light, housing preservation classifications should not be used to evade this presumption. For example, a preservation expenditure on a low-income family unit would constitute an additional unit if the cost of preservation were more than one half of the cost of a new unit in a high-opportunity community. This presumption could be overcome if the school population in the neighborhood were stably integrated or a stably integrated school serves the neighborhood.

To benefit existing residents and attract newcomers, Category 1 housing plans should have targeting objectives to attract middle-income residents, particularly those with school-aged children. These plans should also attract property tax paying businesses that will increase local fiscal capacity, services, and the number of jobs. Such housing plans should include:

- a. Plans for the creation or maintenance of stably integrated neighborhoods;
- b. Plans for the creation or maintenance of stably integrated public or charter schools that are either neighborhood or cluster-magnet schools. See Magnet Appendix. Such schools must meet NCLB standards and make adequate yearly progress;
- c. Plans to increase local government fiscal capacity by attracting higher income individuals and property or sales tax paying businesses that create jobs;
- d. Plans to improve local public health through medical care, healthy food, and local recreation opportunities;
- e. Plans to improve public transit;
- f. Plans for basic maintenance of necessary public infrastructure, including streets, sewers, public buildings, parks, etc.; and
- g. Plans to include the use of federal or state general revenue sharing grants for any purpose coherent with stable racial integration, including targeted property tax incentives to encourage increased fiscal capacity, the creation of new jobs, or reducing local tax rates for improved business and residential climate. HUD and other federal funds should support the implement of these types of plans.

## 2. Category 2 Communities – Racially Mixed Communities (Yellow Area)

These are communities that are presently racially integrated or on a path to becoming integrated within the next ten years. Generally, these are fully developed, relatively dense suburban areas with either low or declining local fiscal capacity or share of jobs. They are often subject to very severe racial steering and mortgage lending discrimination. The goal in such communities should be to the preserve stable racial integration.

Housing plans for Category 2 communities must include fully funded stable integration plans. These plans must include periodic paired racial testing of both renters and homeowners, at a variety of income levels, to detect discrimination that would intensify local or metropolitan segregation. Increasing evidence demonstrates that minority home purchasers are often steered to racially integrated schools in these suburbs, whereas whites of similar income and qualifications are steered toward whiter schools. Paired testing must include data about the racial composition of local neighborhood schools.

Category 2 housing plans must include HMDA data that is frequently and

geographically updated to measure disparities both between individuals and communities. These plans should also require and/or encourage stable integration boards with racially inclusive membership of local officials and important community stakeholders. These boards should have the ability to require local real estate and banking entities to cooperate by appearing before them and responding to reasonable data requests.

Stable integration boards or locally appropriate governmental entities should be encouraged to provide pro-integrative loans or mortgage insurance programs, document claims of housing market discrimination, and create and operate pro-integration marketing plans.

Housing plans in Category 2 communities could include the following policies and community-based strategies to encourage and maintain stably integrated communities:<sup>29</sup>

- a. Expect government leaders and agencies to proactively promote diverse neighborhoods.
- b. Encourage consciousness on the part of urban planners “to examine the consequences of their actions. . . that may either destabilize existing neighborhoods or thwart the development of new diverse neighborhoods.”
- c. Maintain and strengthen fair housing laws.
- d. Encourage public and private funding and programs that promote mixed-income, racially diverse communities.
- e. Develop and disseminate information on strategies to strengthen community-based organizations.
- f. Establish city-wide and regional networks of diverse community organizations.
- g. Develop “[l]eadership training institutes for residents of diverse communities.”
- h. Maintain quality schools and community safety programs in diverse neighborhoods.
- i. Encourage the creation of programs that support mixed-income development.
- j. Encourage local chambers of commerce and other business associations to view diverse communities “as potentially strong markets.”
- k. Encourage the media to tell “the positive stories of diverse community successes.”<sup>30</sup>
- l. Encourage “[l]ocal community organizations, existing institutions, and local governments . . . to be receptive to new groups and be

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<sup>29</sup> See Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORD. URB. L. J. 877, 929–30 (2006) (discussing in-depth policies and strategies).

<sup>30</sup> *Id.*

willing to work with them on common community issues.”

- m. Develop programs to create jobs and improve access to jobs in surrounding communities.
- n. Conduct public discussions about whether “maintaining ethnic- and race-based political constituencies undermines efforts to develop and sustain diverse communities.”

### 3. Category 3 – High-Opportunity Communities (Blue Area)

The Met Council should target High-Opportunity Communities as priority communities for the expenditure of scarce low-income family housing funds and limited enforcement dollars. Moreover, such communities should not receive federal or state housing funds, other federal funds, or state or metropolitan subsidies unless they demonstrate that they are taking steps to diversify. Plans for such communities should include:

- a. Reduction of barriers to affordable housing in zoning codes, development agreement and development practices;
- b. Inclusionary housing;
- c. Pledges to take advantage of existing low-income housing tax credits and other funds to meet their metropolitan share of low-income family housing;
- d. Paired testing to make sure the existing family and rental housing is equally available on the basis of race; and
- e. Pro-integrative mortgage programs.

## XI. Conclusion

The foregoing clearly shows that the DFHEA did not analyze the HUD-provided data completely and seriously. It seems to suggest that housing segregation is caused by neutral preferences and private discrimination that it has no obligation to counter. It fails to note the clear fact that government housing policy, including its own, has caused segregation in both neighborhoods and the region’s schools. It fails to consider the rapid increase in school segregation or analyses provided repeatedly in other comments made during the FHEA process. The DFHEA does not reflect full consideration of the data on these issues and the implications for the region. By effectively excluding pro-integrative civil rights groups from the process and by allowing the process to be dominated by housing developers, whose history has been only of building housing and operating schools that deepen and perpetuate segregation, the Met Council did not allow serious engagement of regional stakeholders. Because the document’s proposed action steps clearly intensify and perpetuate racial segregation, it does not provide a clear pathway toward holding the regional region accountable for its FHEA deliberations. FHEA activities will be meaningful and consequential to the region only in the negative sense—they will ignore or justify the discriminatory behavior of public agencies and private parties.

Sincerely,

Myron Orfield  
Professor of Law and  
Director Institute on Metropolitan Opportunity

## **Magnet School Appendix**

### ***A Magnet School Strategy to Integrate Schools and Strengthen Neighborhoods in the***

#### ***Central and Southwest Light Rail Transit Corridors***

**Introduction.** On-going and planned investments in light rail transit (LRT) in the Twin Cities provide the region with a great opportunity for a new and innovative approach to reduce segregation in the region's schools, narrow the achievement gap, and strengthen and revitalize housing markets in the LRT corridors. This project will provide the research needed to support the design and implementation of a program and bring the most important public and neighborhood actors together to evaluate alternative plans and design one which best meets the needs of all stakeholders.

Minnesota's long-term commitment to inter-district open enrollment and magnet schools can be used to leverage the state's major transit investments by developing new magnet schools directly linked to the new LRT infrastructure and to the job development it encourages. The new LRT lines expand the potential attendance areas for schools in the corridors in two ways: by providing safe, rapid, and reliable transportation to students who live along the entire corridor; and by linking any school location on the corridor to the workforce commuting to existing and new jobs supported by LRT. The resulting pool of prospective students creates the potential for stably integrated magnet schools which would enhance educational opportunities for students of all races and boost the long-term prospects of corridor neighborhoods by enhancing their attraction for middle-income households with children.

The multi-disciplinary project would produce a report which highlights best practices in this policy area and analyzes the characteristics of businesses, commuters, commuting patterns, residents, and public schools in the two corridors. It would also organize the forums needed to bring together the important public actors and representatives from the neighborhoods along the corridors (residents and businesses) for initial planning and program design.

**Background.** School segregation is a serious and increasing problem in the Twin Cities metropolitan area. Racial segregation in schools is important because experience shows us that it creates drastically different education experiences for children of color than for white children. Non-white segregated schools are virtually always also high-poverty schools. In 1995, less than two percent of elementary schools in the Twin Cities (or 11 schools) were more than 90 percent students of color. By 2010, this had increased to 83 schools (or more than eight percent region-wide). More than *91 percent* of the students in these schools are poor, compared to roughly 30 percent in all other schools. The numbers are even starker for Minneapolis and St. Paul. By 2010 fully one-fourth of public schools operated by the public school districts in the two cities were more than 90 percent non-white (44 schools), and 93 percent of the students in those schools were poor.

An extensive research literature documents that racial and economic segregation hurts the kids who attend these schools. The potential effects of creating more integrated schools are broad and long-lasting. The research shows that integrated schools boost academic achievement, attainment, and expectations; improve opportunities for students of color; and generate valuable social and economic benefits. Integrated schools also enhance the cultural competence of white students and prepare them for a more diverse workplace and society.

Attending racially integrated schools and classrooms improves the academic achievement of minority students measured by test scores.<sup>i</sup> Since the research also shows that integrated schools *do not* lower test scores for white students, they represent one of the very few strategies demonstrated to ease one of the most difficult public policy problems of our time—the racial achievement gap. Other academic benefits for minority students include completing more years of education and higher college attendance rates. Long term economic benefits include a tendency to choose more lucrative occupations in which minorities are historically underrepresented and higher lifetime incomes.<sup>ii</sup>

Integrated schools also generate long-term social benefits for students. Students who experience interracial contact in integrated school settings are more likely to live, work, and attend college in more integrated settings.<sup>iii</sup> Integrated classrooms improve the stability of interracial friendships and increase the likelihood of interracial friendships as adults.<sup>iv</sup> Both white and non-white students tend to have higher educational aspirations if they have cross-race friendships.<sup>v</sup> Interracial contact in desegregated settings decreases racial prejudice among students and facilitates more positive interracial relations.<sup>vi</sup> Students who attend integrated schools report an increased sense of civic engagement compared to their segregated peers.<sup>vii</sup>

Integrated schools also make sense from an economic point of view. Giving all children a fair start with the choice to attend opportunity-rich middle-class schools helps create the skilled workforce metropolitan regions need to replace impending baby-boom retirees. Today's students are the next generation of workers who will replace these retirees. People of color will represent an increasing share of the nation's next generations of workers. Segregated schools and a wide gap between white and non-white graduation rates will not yield the skilled workers needed for the region's economy.<sup>viii</sup>

A metropolitan area also jeopardizes its competitive edge and long-term quality of life by permitting segregation to damage educational opportunity and neighborhood stability in its central cities and adjacent suburbs. A region's central cities and its suburbs tend to grow or decline together.<sup>ix</sup> Vibrant central cities can be engines of growth for metropolitan areas.<sup>x</sup> Population growth and economic growth correlate for cities and regions.<sup>xi</sup> In addition, economic growth in a large central city can have positive spillover effects of one to two percent on its suburbs for every one percent increase in the central city.<sup>xii</sup> Recent ecological studies also show associations between segregation and a wide variety of health outcomes including infant and adult mortality rates, homicide rates, teenage childbearing, tuberculosis, cardiovascular disease, and exposure to air pollutants.<sup>xiii</sup>

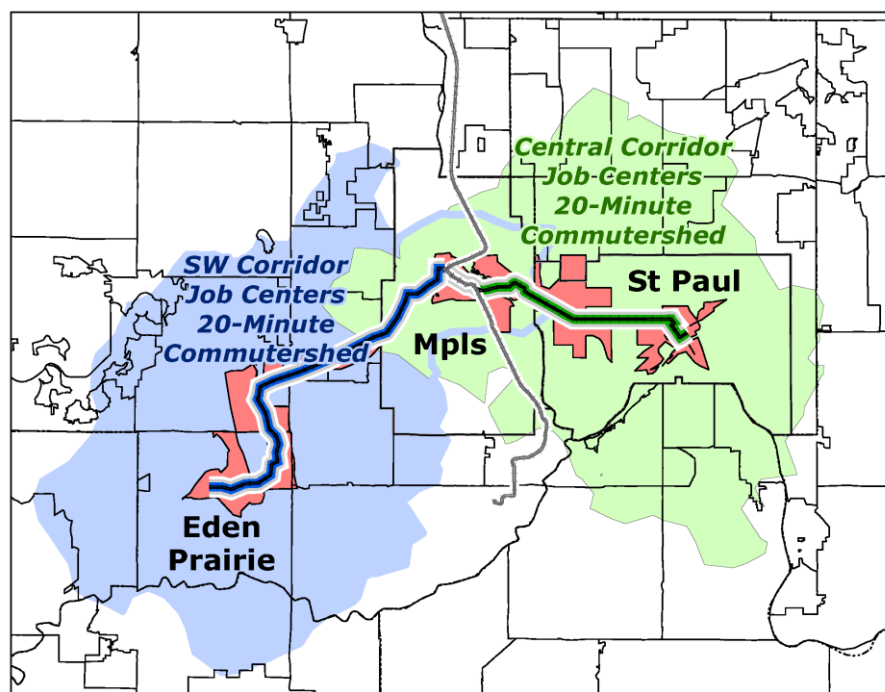
Major transit investments in LRT in the Twin Cities now occurring in the Central Corridor along University Avenue and in the planning stages in the Southwest Corridor provide an enormous opportunity for new, innovative policies to reduce segregation in the region's schools. Minnesota's long-term commitment to school choice—magnet schools in particular—can be used to leverage the state's substantial transit investments by developing new magnet schools directly linked to the new transportation infrastructure and the job development it encourages.

LRT expands the potential attendance areas of schools in the corridors in two ways. First, by providing safe, regular and rapid transportation that students can use, it expands a school's practical service area as a neighborhood school, creating the potential to serve resident students along an entire corridor. Second, LRT (and accompanying economic development initiatives) will encourage high-density job development near stops. School-age children of the workers commuting to these jobs represent another potential pool of enrollees for a school with easy access to the corridor's LRT. Enrolling their children in schools near to the LRT which serves their work locations creates significant advantages for parents.

Because most workers now commute so far to their jobs, schools near their job site are often much more convenient than those near home, making it possible for parents who might not otherwise be able to, to attend parent-teacher meetings and school events during the school day or immediately after school. A brand-new LRT line with safe, reliable and frequent service extends the potential service area to job sites along the entire line, and from those sites into the entire commuter-sheds from which workers are drawn.

The significance of the extending the effective attendance areas of schools is enormous in a metropolitan area like the Twin Cities, where so many of the region's low-income residents and people of color reside in just a few neighborhoods in the region's core areas (including parts of some fully-developed suburbs). Wider attendance areas mean more balanced potential student populations, economically and racially. Prior Institute on Race and Poverty (IRP) research identified nine job centers in the Central and Southwest LRT corridors.<sup>xiv</sup> Map 1 shows the outer boundaries of the combined areas within 20 minutes commuting time of the nine job centers. The contrast between the workers commuting from these larger potential attendance areas and existing schools along the corridors is clear. The workers commuting to the nine job centers on the corridors are markedly more racially balanced. For instance, workers commuting to the nine job centers in 2009 were 85 percent white—a racial make-up very similar to the region as a whole. In contrast, the white share of students in the central city public schools was roughly 30 percent.<sup>xv</sup> Even many of the suburban school districts in the Southwest Corridor could benefit from the wider potential attendance areas. Many schools along the corridor have become very racially diverse and show clear signs of racial transition (Map 2).

**Map 1**



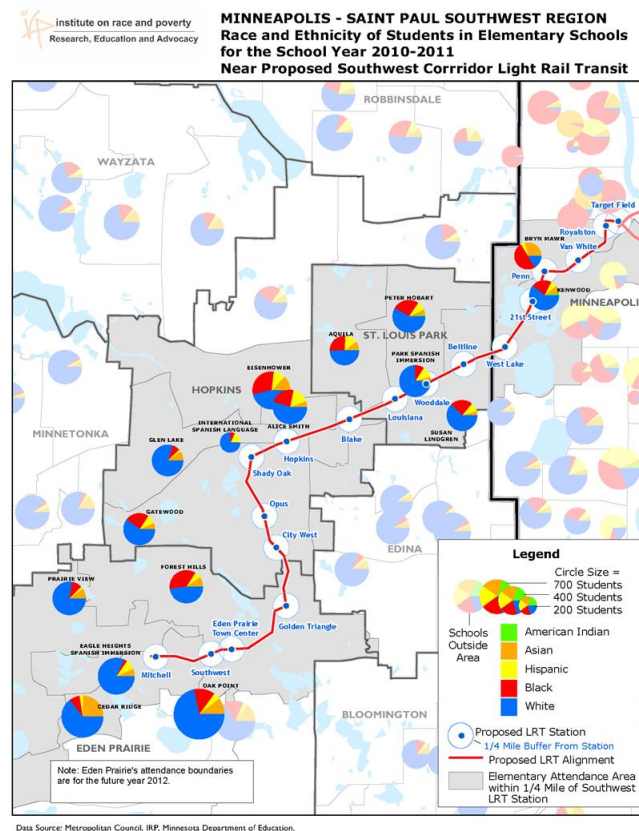
An excellent potential model to exploit these larger potential enrollment zones—magnet schools—already exists and has been in use for a long time in many school districts, including those most directly affected by the new LRT lines. Minneapolis, St. Paul and the West Metro Education Program (WMEP) each have good examples.<sup>xvi</sup> In Minneapolis, South Senior High and Barton Open Elementary School are the best known examples of the



district's use of magnet programs to draw students from a wide area. Central Senior High and Capitol Hill Magnet/Rondo Elementary are prominent examples in St. Paul. And WMEP, which includes most of the districts along the Southwest Corridor, runs two very successful arts magnets—FAIR Crystal and FAIR Downtown.

As a group, these magnets out-perform the rest of the state virtually across the board. White students' reading test scores are better than the statewide average in all six schools and in five of six for math. Black students also perform better—in five of six for reading and four of six for math. This is true despite the fact that poverty rates are quite high in four of the six schools—at roughly 60 percent in

**Map 2**



FAIR Downtown and Central Senior High and at about 40 percent in South Senior High and Capitol High Magnet/Rondo. Recent research in other parts of the country also highlights the potential for magnets to improve student performance and promote integrated schools.<sup>xvii</sup>

## Notes



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- <sup>i</sup> Russell W. Rumberger and Gregory J. Palardy, "Does Segregation Still Matter? The Impact of Student Composition on Academic Achievement in High School," *Teachers College Record*, 107:9 (September 2005): 1999-2045; Roslyn Arlin Mickelson, "Segregation and the SAT," *Ohio State Law Journal*, 67 (2006): 157-199; Roslyn Arlin Mickelson, "The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools," *North Carolina Law Review*, 81 (2003): 1513-1562; Kathryn Borman et al., "Accountability in a Postdesegregation Era: The Continuing Significance of Racial Segregation in Florida's Schools," *American Educational Research Journal*, 41: 3 (2004): 605-631; Geoffrey D. Borman and N. Maritza Dowling, "Schools and Inequality: A Multilevel Analysis of Coleman's Equality of Educational Opportunity Data," (2006) Paper presented at the annual meeting of the American Educational Research Association, San Francisco, CA.
- <sup>ii</sup> R. L. Crain and J. Strauss, "School Desegregation and Black Occupational Attainments: Results from a Long-Term Experiment" (Baltimore: Center for Social Organization of Schools, 1985), Report No: 359; Goodwin Liu and William Taylor, "School Choice to Achieve Desegregation," *Fordham Law Review*, 74 (2005), p. 791; Jomills H. Braddock and James M. McPartland, "How Minorities Continue to be Excluded from Equal Employment Opportunities: Research on Labor Market and Institutional Barriers," *Journal of Social Issues*, 43: 1 (1987): 5-39; Janet Ward Schofield, "Maximizing the Benefits of Student Diversity: Lessons from School Desegregation Research," in Gary Orfield and Michael Kurlaender (eds.) *Diversity Challenged: Evidence on the Impact of Affirmative Action* (Cambridge, MA: Harvard Education Press, 2001), p. 99. Orley Ashenfelter, William J. Collins, and Albert Yoon, "Evaluating the Role of *Brown vs. Board of Education* in School Equalization, Desegregation, and the Income of African Americans," *American Law and Economics Review*, 8:2 (2006): 213-248; Michael A. Boozer et al., "Race and School Quality Since *Brown v. Board of Education*," *Brookings Papers on Economic Activity. Microeconomics* (1992), pp. 269-338.
- <sup>iii</sup> Jomills H. Braddock, Robert L. Crain, and James M. McPartland, "A Long-Term View of School Desegregation: Some Recent Studies of Graduates as Adults," *Phi Delta Kappan*, 66: 4 (1984): 259-264.
- <sup>iv</sup> Maureen Hallinan and Richard Williams, "The Stability of Students' Interracial Friendships," *American Sociological Review*, 52 (1987): 653-664; Richard D. Kahlenberg, *All Together Now* (Washington, D.C.: Brookings Institution Press, 2001).
- <sup>v</sup> Maureen Hallinan and Richard Williams, "Students' Characteristics and the Peer Influence Process," *Sociology of Education*, 63 (April 1990): 122-132.
- <sup>vi</sup> Thomas Pettigrew and Linda Tropp, "A Meta-Analytic Test of Intergroup Contact Theory," *Journal of Personality and Social Psychology*, 90 (2006): 751-783; Melanie Killen and Clark McKown, "How Integrative Approaches to Intergroup Attitudes Advance the Field," *Journal of Applied Developmental Psychology*, 26 (2005): 612-622; Jennifer Jellison Holme, Amy Stuart Wells, Anita Tijerina Revilla, "Learning through Experience: What Graduates Gained by Attending Desegregated High Schools," *Equity and Excellence in Education*, 38:1 (2005): 14-24.
- <sup>vii</sup> Michal Kurlaender, John T. Yun, "Fifty Years After Brown: New Evidence of the Impact of School Racial Composition on Student Outcomes," *International Journal of Educational Policy, Research and Practice*, 6:1 (2005):51-78.
- <sup>viii</sup> Brookings Institution, *Mind the Gap: Reducing Disparities to Improve Regional Competitiveness in the Twin Cities* (2005), [http://www.brookings.edu/metro/pubs/20051027\\_mindthegap.pdf](http://www.brookings.edu/metro/pubs/20051027_mindthegap.pdf), p. 5.
- <sup>ix</sup> Andrew Haughwout and Robert Inman, "How Should Suburbs Help Their Central Cities?" Federal Reserve Bank of New York Staff Report No. 186 (May 2004), available at [www.newyorkfed.org/research/staff\\_reports/sr186.pdf](http://www.newyorkfed.org/research/staff_reports/sr186.pdf) (accessed February 2008); Robin Leichenko, "Growth and Change in U.S. Cities and Suburbs," *Growth and Change*, 32 (2001): 326-354.
- <sup>x</sup> Andrew Haughwout and Robert Inman, "How Should Suburbs Help Their Central Cities?" Federal Reserve Bank of New York Staff Report No. 186 (May 2004), available at [www.newyorkfed.org/research/staff\\_reports/sr186.pdf](http://www.newyorkfed.org/research/staff_reports/sr186.pdf) (accessed February 2008); Robin Leichenko, "Growth and Change in U.S. Cities and Suburbs," *Growth and Change*, 32 (2001): 326-354; Richard Voith, "Do Suburbs Need Cities?" *Journal of Regional Science*, 38:3 (1998): 445-464.
- <sup>xi</sup> Robin Leichenko, "Growth and Change in U.S. Cities and Suburbs," *Growth and Change*, 32 (2001): 326-354.

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- <sup>xii</sup> Richard Voith, "Do Suburbs Need Cities?" *Journal of Regional Science*, 38: 3 (1998): 445-464. Similar results from more refined research came from advanced modeling using employment data rather than income. For 28 Spanish metro regions across 35 years, results showed that a 1 percent increase in economic activity in large central cities (populations over 300,000) resulted in a 2 percent increase in suburbs; for smaller central cities, the result was a 1 percent increase for the suburbs. Albert Solé-Ollé and Elisabet Viladecans-Marsal, "Central Cities as Engines of Metropolitan Area Growth," *Journal of Regional Science*, 44: 2 (2004). See also Robin Leichenko, "Growth and Change in U.S. Cities and Suburbs," *Growth and Change*, 32 (2001): 326-354.
- <sup>xiii</sup> Michael R. Kramer and Carol R. Hogue, "Is Segregation Bad for Your Health?" *Epidemiology Review*, vol. 31 (2009), pp. 178-194. Dolores Acevedo-Garcia, Kimberly A. Lochner, Theresa L. Osypuk and S. V. Subramainian, "Future Directions in Residential Segregation and Health Research: A Multilevel Approach," *American Journal of Public Health*, vol. 93, no. 2, pp. 215-221.
- <sup>xiv</sup> The job centers were identified with data from the 2000 Census Transportation Planning Package. They were derived by combining contiguous high-job-density areas and applying a size limit. See Luce, Thomas, Myron Orfield and Jill Mazullo "Access to Growing Job Centers in the Twin Cities Metropolitan Area," *CURA Reporter*, Vol. 36, No. 1, Spring 2006.
- <sup>xv</sup> Sources: Longitudinal Employment-Household Dynamics program and the Minnesota Department of Education.
- <sup>xvi</sup> Minneapolis and St. Paul have each reduced their emphasis on magnet programs in recent years, but in both cases the primary reason was to reduce transportation costs. The potential synergies between the new transportation investments and the school districts in this proposal eliminate this problem.
- <sup>xvii</sup> Robert Bifulco, Casey D. Cobb and Courtney Bell, Can Interdistrict Choice Boost Student Achievement? The Case of Connecticut's Interdistrict Magnet School Program, 31 *Educational Evaluation and Policy Analysis* 323 (2009); and Dave Ballou, Ellen Goldring, and Keke Liu, *Magnet Schools and Student Achievement*, National Center for the Study of Privatization in Education (2006). Bifulco et al. examine inter-district magnets in Hartford and New Haven CT and find that the programs have: (1) provided central city students with access to less racially and economically segregated schools, and (2) improved achievement for both middle and high school city students. Ballou et al. examine a "mid-sized southern city" and find positive achievement effects for magnets but the estimates are relatively imprecise, and are not all statistically significant.

## Appendix IV: IMO Comments on Metropolitan Council Housing Policy Plan

## **Comments of the Institute on Metropolitan Opportunity on the Metropolitan Council's Draft Housing Policy Plan**

*September 26, 2014*

One of the most severe obstacles for the Twin Cities in the 21<sup>st</sup> century is the concentration of poverty and segregation, and the divisions they are creating across the metropolitan region. Unfortunately, the Metropolitan Council's draft Housing Policy Plan, which perpetuates the region's segregation while failing to affirmatively further fair housing, is insufficient to overcome these obstacles.<sup>1</sup>

The Plan itself clearly acknowledges many of the challenges it faces. Its first and second parts – “Housing for a Growing, Thriving Region” and “Outcomes,” respectively – discuss the disparities that afflict the Twin Cities. However, the substantive policies described in the third part, “Council Policies and Roles to Expand Viable Housing Options,” barely attempt to reduce those disparities. Rather than proposing any sort of aggressive measures to remedy the problems it had described, Part III in many cases “adopts” policies that the Council already follows – policies which, with the benefit of hindsight, we can confidently say have *actively contributed* to the region's disparities. A change of direction is needed, but the current Plan manifests nothing so much as a desire to stay the course.

This is wholly inadequate. In order to reverse current trends, major adjustments need to be made to the Council's housing policy – adjustments which the Housing Policy Plan does not require, or even consider. Most strikingly, the Plan is almost completely bereft of strong incentives to encourage local governments to address housing disparities, and in particular, appears to envision no consequences for cities which ignore the Council's housing guidance. Moreover, the Plan makes no attempt to reinstitute the more effective approach of previous years, where bold and easily-understood policies attacking segregation and income disparity were supported with penalties for areas that refused to meet their housing obligations. The Plan as it currently exists is not only unlikely to reverse the deplorable regional trend toward greater poverty and segregation, but is in violation of the Metropolitan Council's legal obligations to combat racial and economic inequality in housing.

The comments below first briefly discuss the extent of racial disparities in the Twin Cities and the Council's legal obligations, then summarize the Plan's description of housing issues and subsequent failure to address those issues. They propose a number of

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<sup>1</sup> Metropolitan Council, *Housing Policy Plan* (2014) [hereinafter Housing Policy Plan].

specific policy changes that would dramatically improve the Plan's ability to accomplish its goals.

## **I. Growing Segregation in the Twin Cities**

Housing and schools in the Twin Cities were not always segregated. In the early 1990s, only 3 percent of the region's population lived in majority nonwhite, high poverty areas; only about 2,000 (or 2.5 percent) of the region's nonwhite students were in schools that were more than 90 percent nonwhite.<sup>2</sup>

Over the previous two decades, this has all changed. By 2010, the percentage of the regional population in majority nonwhite, high-poverty areas rose by three times to 9 percent.<sup>3</sup> Today, the two central cities together only contain 23 percent of regional population, but 55 percent of the region's nonwhite residents.<sup>4</sup> They also contain over half the region's subsidized affordable housing: 37 percent in Minneapolis and 21.7 percent in Saint Paul. The number of schools with more than 90 percent nonwhite students had increased more than seven-fold (from 11 to 83); the number of nonwhite students in those schools had risen by more than 10 times (from 2,000 to 25,400), representing an increase in the percentage of nonwhite students in highly segregated environments from 2.5 percent to 16 percent.

Some of these changes simply reflect the fact that the region became more racially diverse during the period. However, other metropolitan areas of roughly the same size and with similar demographic histories have not shown the same pattern of deterioration. For instance, the number of schools in the Portland region with more than 90 percent nonwhite students was just 2 in 2009 (up from 0 in 2000); in Seattle it was only 25 (up from 14); and in Pittsburgh it was 25 (down from 27).<sup>5</sup> The neighborhood comparisons are no better. In 2012, 19 percent of low-income black residents of the Twin Cities lived in high-poverty census tracts (up from 13 percent in 2000) compared to just 3.4 percent of low-income black residents in Seattle (down from 3.5 percent in 2000) and 1.6 percent in Portland (down from 1.9 percent in 2000).<sup>6</sup>

Not surprisingly, the Twin Cities region now shows some of the widest racial disparities in the country. Recent data show alarming gaps between whites and nonwhites in income, unemployment, health, and education. Poverty rates for black Minnesotans are more than four times those for whites; while household incomes for blacks are less than half of those for whites; reading proficiency rates for black students are less than half those for whites in most school grades and years; incarceration rates for blacks are 20-25

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<sup>2</sup> Metropolitan Council, *Choice, Place and Opportunity: An Equity Assessment of the Twin Cities Region* (2014).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> National school data are from the National Center for Education Statistics. The equivalent numbers for the Twin Cities from this source are even worse than those generated using local data sources: 112 schools with more than 90 percent non-white students in 2009, compared to 37 such schools in 2000.

<sup>6</sup> National residential statistics are derived from Census data compiled and provided by Paul Jargowsky and the Center for Urban Research and Education at Rutgers University.

times greater than for whites; and black unemployment rates are two to three times those for whites. All of these disparities put the region and the state near the bottom of national rankings.<sup>7</sup>

## **II. The Metropolitan Council's Legal Obligations**

There are at least three independent, though related, sources of law that obligate the Met Council to reduce segregation and pursue fair housing goals: § 3604 of the Fair Housing Act (FHA)<sup>8</sup>, § 3608 of the FHA<sup>9</sup>, and the Metropolitan Land Use Planning Act (MLUPA)<sup>10</sup>.

### **Section 3604**

All entities, public or private, are forbidden from taking actions which discriminate in the provision of housing on the basis of race. This proscription is explicitly extended to the implementation of “land-use rules, ordinances, policies or procedures” with a racially discriminatory impact.<sup>11</sup> For the purposes of § 3604, discrimination includes actions which perpetuate segregated living patterns – for instance, actions which prevent the construction of racially integrative housing or concentrate segregative housing in a single neighborhood or municipality. Because affordable housing is typically disproportionately occupied by nonwhite populations, the placement of affordable housing has been frequently treated by the courts as a proxy for the placement of segregated housing. The perpetuation of segregation can be established by evidence of disparate impact on a protected racial group or pattern of segregated housing placement and/or occupancy.

### **Section 3608**

Governmental recipients of federal housing funds have an obligation under § 3608(d) of the FHA to “affirmatively further” fair housing, which requires them to use their “immense leverage” to create “integrated and balanced living patterns.”<sup>12</sup>

In a recently proposed rule, designed to provide guidance for recipients of fair housing funding, HUD defines “[a]ffirmatively furthering fair housing” as “taking proactive steps beyond simply combating discrimination to foster more inclusive communities.”<sup>13</sup> Specifically, the proposed rule states that affirmatively furthering fair housing “means taking *steps to overcome segregated living patterns and support and*

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<sup>7</sup> See, e.g., Jonathan Rose, *Disparity Analysis: A Review of Disparities Between White Minnesotans and Other Racial Groups* (2013).

<sup>8</sup> 42 U.S.C. § 3604

<sup>9</sup> 42 U.S.C. § 3608

<sup>10</sup> Minn. Stat. § 473 *et seq.*

<sup>11</sup> 24 C.F.R. §100.70(d)(5).

<sup>12</sup> NAACP v. Sec’y of Hous. and Urban Dev., 817 F.2d 149, 156 (1st Cir. 1987) (Breyer, J., holding the Title VIII imposed a duty on HUD beyond simply refraining from discrimination).

<sup>13</sup> Affirmatively Furthering Fair Housing, 78 Fed. Reg. 43710-01 § 5.152.



*promote integrated communities, to end racially and ethnically concentrated areas of poverty, and to foster and maintain compliance with civil rights and fair housing laws.”*<sup>14</sup>

The rule’s commentary further notes:

[R]acially or ethnically concentrated areas of poverty are of particular concern because they couple fair housing issues with other significant local and regional policy challenges. These areas clearly fall in the domain of fair housing, as they often reflect legacies of segregated housing patterns. Of the nearly 3,800 census tracts in this country where more than 40 percent of the population is below the poverty line, about 3,000 (78 percent) are also predominantly minority. . . . *Consequently, interventions that result in reducing racially and ethnically concentrated areas of poverty hold the promise of providing benefits that assist both residents and their communities.*<sup>15</sup>

With HUD issuing new guidance on the issue, the outer limits of the obligation to affirmatively further fair housing have not yet been tested, and may still expand. Unquestionably, however, the provision requires affirmative steps above and beyond merely avoiding the activities proscribed by § 3604 and § 3605. Case law has illuminated some of these requirements.

First, and minimally, government agencies must analyze the impact of new housing on racial concentration. This obligation was most thoroughly discussed in the foundational case *Shannon v. HUD*, cited at length in the new HUD rule.<sup>16</sup> According to *Shannon* and its progeny, § 3608 does not merely prevent government agencies from building low-income housing in areas of minority concentration, which would already be unlawful under § 3604(a)’s perpetuation-of-segregation cause of action. It also obligates governments to *undertake the analysis* required to demonstrate that they are not creating segregation, *in advance* of the siting of low-income housing. In other words, while § 3604 disallows certain discriminatory outcomes, § 3608 places on public agencies an additional requirement that they use particular methods. In one notable case, HUD was found to have violated § 3608 for administering grants to the City of Boston without ensuring that the grants were not creating discriminatory effects – even though subsequent analysis showed that no discrimination was occurring.<sup>17</sup> Governments are not permitted to “fly blind”, so to speak, when it comes to housing.

Another consequence of § 3608 is that local agencies with discriminatory practices, or whose practices create a discriminatory effect, can potentially be stripped of their federal housing funds by HUD. In the past, private plaintiffs have successfully sought relief from HUD through fair housing complaints directed at local and state

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<sup>14</sup> *Id.* (emphasis added).

<sup>15</sup> *Id.* at 43713 (emphasis added).

<sup>16</sup> *Shannon v. HUD*, 436 F.2d 809 (3d Cir. 1970).

<sup>17</sup> *NAACP v. Sec’y of Hous. and Urban Dev.*, 817 F.2d 149, 156 (1st Cir. 1987).

governments.<sup>18</sup> And under § 3608(e)(5), a claim can be brought against HUD itself “if it is aware of a grantee’s discriminatory practices but has made no efforts to force it to comply with the Fair Housing Act by cutting off existing federal financial assistance.”<sup>19</sup> This standard can place many tens of millions of dollars in local funding at risk, even in cases where a local entity is not itself subject to lawsuit or discrimination claim.

### **Metropolitan Land Use Planning Act**

As acknowledged by the proposed Plan, the Met Council is obligated by MLUPA, which created the Council and governs its activities, to help communities coordinate their housing efforts. The Act requires local governments to adopt regional “fair share” housing requirements and means of enforcing those requirements: comprehensive plans must incorporate “a housing implementation program . . . which will provide sufficient existing and new housing to meet the local unit’s share of the metropolitan area need for low and moderate income housing.”<sup>20</sup> The law envisions for the Met Council a key coordinating role in this process: the Act requires it to “prepare and adopt guidelines and procedures . . . which provide assistance to local governmental units” in fulfilling the fair share provisions.<sup>21</sup> As a result, the Met Council is not only subject to § 3604’s duty to not perpetuate segregation, and § 3608’s duty to affirmatively further fair housing, but, through state law, a duty to implement a true fair share system which pursues an even distribution of housing among local units of government.

### **III. The Plan’s Discussion of Concentrations of Poverty and Racial Segregation**

The Plan does not shy away from identifying many disparities sufficient to trigger these legal obligations, discussing at length the problems that plague housing in the Twin Cities. In a discussion of concentrations of poverty and racial concentrations of poverty, it bluntly acknowledges that “[l]iving in areas of concentrated poverty hurts people in many ways,” and alluding to the high crime, underperforming schools, poor health, and lack of economic mobility that plague residents of these regions.<sup>22</sup> A later section cogently lays out the ways which concentrated poverty can self-perpetuate:

The social and supportive services that often arise to address the problems of the community (jobs programs, public assistance offices, supportive housing) only strengthen the perception that investment is a losing proposition. Thus a destructive cycle perpetuates. Public and non-profit investments—in both development and services—become concentrated in neighborhoods where the need now exists. Market-rate investment in

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<sup>18</sup> See, e.g., HUD, Letter of Determination of Noncompliance In Re: Diamond State Community Land Trust v. Sussex County Planning and Zoning Commission (Aug. 23, 2012).

<sup>19</sup> Anderson v. City of Alpharetta, Ga., 737 F.2d 1530, 1537 (11th Cir. 1984).

<sup>20</sup> Minn. Stat. 473.859 subd. 4.

<sup>21</sup> Minn. Stat. 473.854.

<sup>22</sup> Housing Policy Plan 10.

neighborhoods with concentrations of low-income households becomes risky for both the private and public sectors.<sup>23</sup>

Admirably, the Plan also recognizes the importance of housing choice. For instance, on page 28, it states that “perhaps above all, people need real choice in determining *where*, in what style, and with what amenities both inside and out their home might be.”<sup>24</sup> It continues in the same vein, stating that “[a] region with truly viable housing choice is one that allows households to secure housing affordable to them, *in communities where they would like to live . . .*”<sup>25</sup> On page 10, it explicitly connects housing choice and segregation, noting that “[b]arriers that limit residential choices – *such as racial discrimination and a lack of affordable housing in a variety of locations* – hinder the ability of residents to move out of areas of concentrated poverty and contribute to the creation of Racially Concentrated Areas of Poverty.”<sup>26</sup> Behind the cautious policy language is a straightforward idea: because there isn’t enough affordable housing in desirable neighborhoods, the Twin Cities are becoming more segregated.

The Plan admits that excessive alarm over gentrification is an obstacle to an equitable housing distribution. Although it does briefly fret over the possibility of distressed neighborhoods receiving *too much* investment – “improvements to an impoverished neighborhood, such as transit investment, may inflate the cost of housing and displace residents . . . just as conditions are improving” – it also concedes that, in some cases, “[t]he scale of these concerns may be *only resident perceptions*.”<sup>27</sup> Ultimately, the Plan seems to assert that fear of gentrification primarily serves as an obstacle to housing equity: “[l]ow-income neighborhoods may be as wary of market-rate development as so-called higher-income neighborhoods are of affordable housing.”<sup>28</sup> The discussion concludes by prescribing more housing to higher-income regions, and more private investment to low-income neighborhoods: “[i]n addition to attracting a mix of investment to Areas of Concentrated Poverty, creating a more equitable region requires simultaneously increasing housing choices for low- and moderate-income households outside of Areas of Concentrated Poverty.”<sup>29</sup>

Finally, on page 44, the Plan briefly discusses the well-known interaction of housing and education. The language in this section is needlessly timid. For instance, rather than provide readily-available statistics on school performance and poverty, it only notes that “[a]reas of concentrated poverty have – or are believed to have – poorer performing schools.”<sup>30</sup> But ultimately, the Plan does identify the corrosive downward spiral that can bind together poverty and education:

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<sup>23</sup> *Id.* at 30.

<sup>24</sup> *Id.* at 28 (emphasis added).

<sup>25</sup> *Id.* (emphasis added).

<sup>26</sup> *Id.* at 10 (emphasis added).

<sup>27</sup> *Id.* at 30 (emphasis added).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 44.

Children living in neighborhoods with concentrated poverty may be less prepared for school and may receive an education inferior to children in neighborhoods with less poverty, limiting their ability to stop the cycle of poverty. Families with enough income to live where they choose are less likely to live in areas of concentrated poverty, in part due to expectations that schools elsewhere are better.<sup>31</sup>

Notably absent from these passages is any substantive discussion of intentional discrimination. However, while intentional discrimination undoubtedly occurs in the Twin Cities housing market, it is not a necessary precursor to any of the legal obligations faced by the Council.

Throughout Part II, the Plan assigns the Council a concrete – if nonspecific and sometimes noncommittal – set of roles in response to the maldistribution of housing and opportunity. It envisions direct investment in affordable housing in higher-income areas (e.g., “[s]trategically invest Council resources to assist community efforts to increase . . . housing types and costs [and] create and preserve mixed-income neighborhoods,” “[i]nvest in and encourage new affordable housing in higher-income areas of the region”<sup>32</sup>). It also anticipates close work in collaboration with local municipalities to expand affordable housing options, “especially in areas underserved by affordable housing and to house extremely-low-income households earning less than 30% of the area media income.”

These broad recommendations, however, are not reflected in the Plan’s more specific policy initiatives.

#### **IV. Critique of Proposed Council Policies**

Starting on page 49, the Plan discusses a so-called “triumvirate” of quantitative affordable housing measures, which “inform the regional understanding of affordable housing needs.” While there is much benefit in adopting quantitative measures of housing progress, and using such measures to award funding, each of the proposed measures is severely flawed in design or implementation.

##### **Housing Need Allocations**

The Council’s first measure, the Allocation of Housing Need, is derived from its obligations under MLUPA, which require that local units of governments design a housing implementation program to “provide sufficient existing and new housing to meet the local unit’s share of the metropolitan area need for low and moderate income housing.”<sup>33</sup> MLUPA also requires the Met Council to coordinate local activity in this

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 29.

<sup>33</sup> Minn. Stat. 473.859 subd. 4.

regard.<sup>34</sup> The Housing Policy Plan recognizes that these provisions of MLUPA require a “fair share” approach to housing.

In the past, the council has assigned each municipality a base “fair share” target arising out of projected growth, and then adjusted that figure on the basis of three factors: the regional distribution of low-wage jobs and workers, transit access, and the availability of existing affordable housing in a municipality. The Plan proposes using the same three adjustment factors, and recent materials distributed to the Needs Allocation Subgroup of the Housing Policy Plan – the workgroup formed to advise the Council on its fair share calculations for 2020-2030 – outline a similar overall approach for the new plan. All of the proposed methods continue to calculate local “fair share” based on the Council’s growth projections for the period. Proposed adjustments to a basic fair share target included:

- Adjusting the fair share proportionately with the ratio of low-wages jobs within five miles of the town’s centroid and low-wage workers within five miles. For instance, if this ratio is 1.2, the fair share allocation would be increased by 20 percent.
- Increasing the fair share by 20 percent in municipalities in the two highest categories of a four-level measure of transit access and decreasing it by 20 percent in areas in the lowest-access category.
- Adjusting the fair share for existing affordable housing in one of two ways:
  - Proportional adjustments based on the difference between the locality’s current share of affordable housing and the regional average.
  - Lowering the localities target to 10 percent of projected growth if the local share of affordable housing is higher than the 2030 regional target. However, IMO simulations show that this method would not produce region-wide fair targets anywhere close to the calculated need of 54,600. It will therefore not be a factor in the following discussion.

Although this process is incomplete, a number of fundamental problems unite all the methods under discussion.

### **Housing Need Allocations: Growth Share**

First, the proposed methodologies all rely on the Council’s household growth projections. This procedure creates a serious risk of artificially inflated targets in the central cities and inner suburbs while reducing them in middle and outer suburbs. Historically, the Council’s growth projections have always overstated expected growth in core areas. There is significant institutional pressure to project growth in the core of the

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<sup>34</sup> Minn. Stat. 473.854.

region, as it is politically unpalatable to forecast stable or declining population in the core of the region, where the Council's policies are often designed to enhance growth.

The effects of this can be clearly seen in Maps 1 and 2, below.<sup>35</sup> These maps compare earlier Council forecasts for the years 2000 and 2010 to actual population growth over the same periods. In both maps, core areas grew consistently less than predicted, while the outer suburbs received more growth than expected. There is no reason to assume that current projections will not suffer from the same biases.<sup>36</sup> Whatever else might be drawn from this, it is important that the Council's housing policy not be based on faulty indicators.

Second, even if the Council's growth projections were reliable, the use of projected growth in this manner is problematic. MLUPA requires each community in the metropolitan area to contribute "the local unit's share" of affordable housing; the Council itself reads this as a "fair share" obligation.<sup>37</sup> However, relying on growth to set the base share can potentially insulate communities with stable population growth from any need to contribute additional affordable housing, regardless of whether low- and moderate-income families have housing choice in those areas.

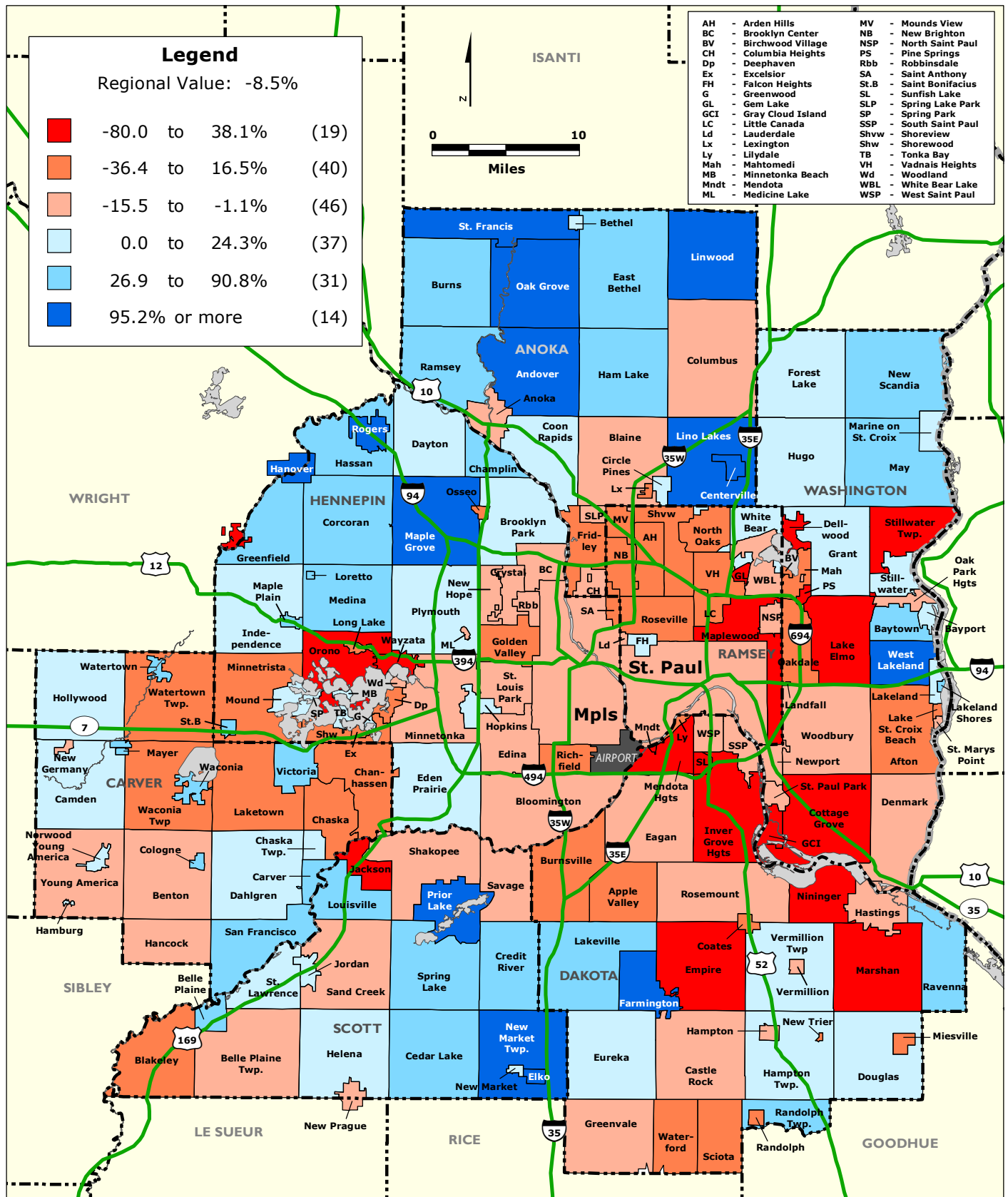
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<sup>35</sup> These maps are replicated from MYRON ORFIELD AND TOM LUCE, *REGION: PLANNING THE FUTURE OF THE TWIN CITIES* (2010).

<sup>36</sup> Despite the fact that the central cities (especially Minneapolis) have had many housing starts/permits in recent years, the most recent data show the old growth pattern re-emerging (as people adjust to higher gas prices, the economy recovers, and the financial/foreclosure crisis eases in the outer suburbs).

<sup>37</sup> Minn. Stat. 473.859 subd. 4; *see also* Housing Policy Plan 49.

**Map 1: Percentage Difference Between the Actual Population in 2000 and the 2000 Forecasted Population from 1975**



Data Source: Metropolitan Council.





## Housing Need Allocations: Existing Affordable Housing

The way that the proposed methods adjust for existing affordable housing stocks is also seriously flawed. The targets are given in absolute numbers of housing units, and surpluses or shortfalls in affordable housing are also calculated in numbers of housing units.<sup>38</sup> However, under the current method, adjustments to the base share for the existing affordable housing factor are proportional, not absolute.<sup>39</sup> In other words, a community with a 20 percent oversupply of housing has its base share adjusted downwards by 20 percent. This is mathematically nonsensical, especially since the adjustment is applied to the growth share, not the community's overall housing. There is simply no reason to expect that an area that has over- or under-provided affordable housing by a certain proportion in the past can be restored to its fair share by over- or under-providing that same proportion of *new* affordable housing growth. Proportional adjustments – increasing or decreasing a fair share target by a percentage – also guarantee that *all* places will be required to add affordable housing even if they already have much greater affordable housing shares than other parts of the region – indeed, even if their existing housing stock is already 100 percent affordable. This directly contradicts MLUPA's description of local fair share obligations, which explicitly allows for communities to meet their obligation by “providing sufficient *existing* or new housing.”<sup>40</sup>

For instance, using the Met Council's estimate of the percentage of current housing (inside the MUSA) affordable at 80 percent or less of regional median income (53 percent according to Council data used to support the Subgroup), Minneapolis had 15,296 more affordable units in 2010 than its “fair share” of 53 percent. Using the current methodology, however, Minneapolis's affordable need allocation is still approximately 10,700 units from 2020 to 2030 – or 82 *percent of total projected growth*. What sense would it make to require Minneapolis to build more affordable housing in future years, given that the model already acknowledges that the city's current share of affordable housing exceeds the regional average by an even larger number of units? St. Paul and many inner suburbs are in similar situations.

This flaw is particularly egregious because a fairer and more intuitive method is easily available. Instead of using a proportional approach, the Plan should use absolute figures. Surpluses (or shortages) of affordable units should simply be subtracted from (or added to) fair share targets.<sup>41</sup>

Maps 3 and 4 demonstrate the enormous practical implications of this flaw. They show how fair share obligations would be distributed around the region using a proportional affordable housing adjustment (Map 3) versus an adjustment that adds or subtracts units (Map 4). A city's fair share obligation was capped at 65 percent of

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<sup>38</sup> See Metropolitan Council, *Allocation of Housing Needs 2010-2020*.

<sup>39</sup> *Id.*

<sup>40</sup> Minn. Stat. 473.859 subd. 4 (emphasis added).

<sup>41</sup> Low-wage jobs and workers and transit access are measured in fundamentally different units than housing counts, so it is reasonable to use proportional adjustments in those cases.

projected growth in both simulations, an adjustment suggested in materials submitted to the Needs Allocation Subgroup.

Both of the calculations underlying the maps make proportional adjustments for low-wage workers and jobs and transit access like those used in the past (and outlined in materials distributed by Met Council staff to the Subgroup).<sup>42</sup> Map 3 shows each city's fair share as a percentage of projected growth, if fair shares were increased or decreased by the percentage that the place's current affordable housing rate differs from the regional average. For instance, in this case the number of additional affordable units required of Minneapolis would be reduced by 9.2 percent because its current affordable housing share is estimated to be 62.2 percent and the regional average is 53 percent.

Map 4 shows each city's fair share as a percentage of projected growth, if current shortages or surpluses are added or subtracted to need allocations in absolute numbers, after adjusting for low wage jobs/workers and transit.

The differences between the two methods are dramatic. Fair share obligations are concentrated in the central cities, inner suburbs and a few middle suburbs west of Minneapolis using the proportional adjustment (Map 3). Using this method, Minneapolis and almost all inner suburbs would be at the maximum percentage fair share (65 percent of projected growth in housing units) while most middle and outer suburbs would have much lower obligations. In this scenario, Minneapolis would be expected to add 8,515 new affordable units during the decade out of total growth of 13,100 units – the 65 percent maximum. Many inner ring suburbs that already have greater than average affordable housing shares – such as Richfield, Hopkins, and West St. Paul – are also at the cap. At the same time, many relatively affluent middle and outer suburbs get relatively low fair shares – like Apple Valley where the fair share would be only 26 percent of projected growth (whether capped or not).

Map 4 shows the results of the alternative affordable housing adjustment. A band of areas along the I-94 corridor with large current surpluses of affordable housing, from Oakdale to Anoka, show much lower obligations, while higher-income middle and outer suburbs with little affordable housing show larger fair share targets.

Overall, the fair share targets in Map 4 correlate much more strongly (negatively) with current affordable housing distributions.<sup>43</sup> In other words, the proportional method used in the first simulation (Map 3) would further concentrate poverty in the central cities and some inner suburbs while the additive method (Map 4) would help to spread low-income households more evenly across the region.

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<sup>42</sup> Each method produces a regional total of fair share obligations reasonably close to the estimated need of 54,600. The proportional adjustment runs produces regional totals of about 65,500 units (uncapped) and 57,000 units while the additive adjustment models give totals of about 62,000 and 45,100. The formulas could be easily fine-tuned to produce the exact amount needed.

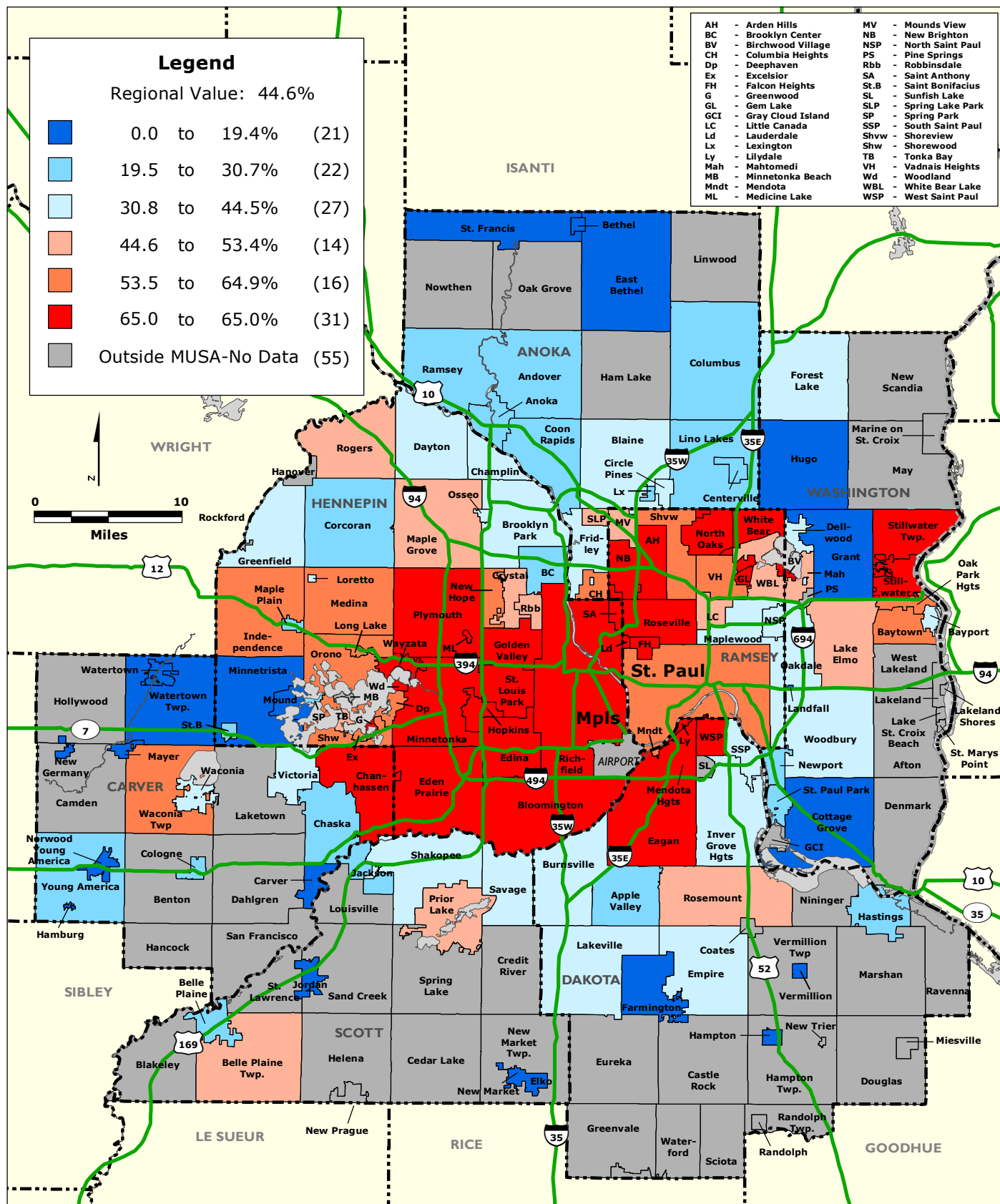
<sup>43</sup> The correlation between the fair share percentages in Map 3 and current affordable housing percentages is -.34 while it is -.84 for the percentages in Map 4.

The Map 4 distributions would also be much more likely to direct new affordable housing to areas near higher-performing schools. The percentages in Map 4 are strongly positively correlated with local school performance while those in Map 3 are weakly negatively correlated.<sup>44</sup>

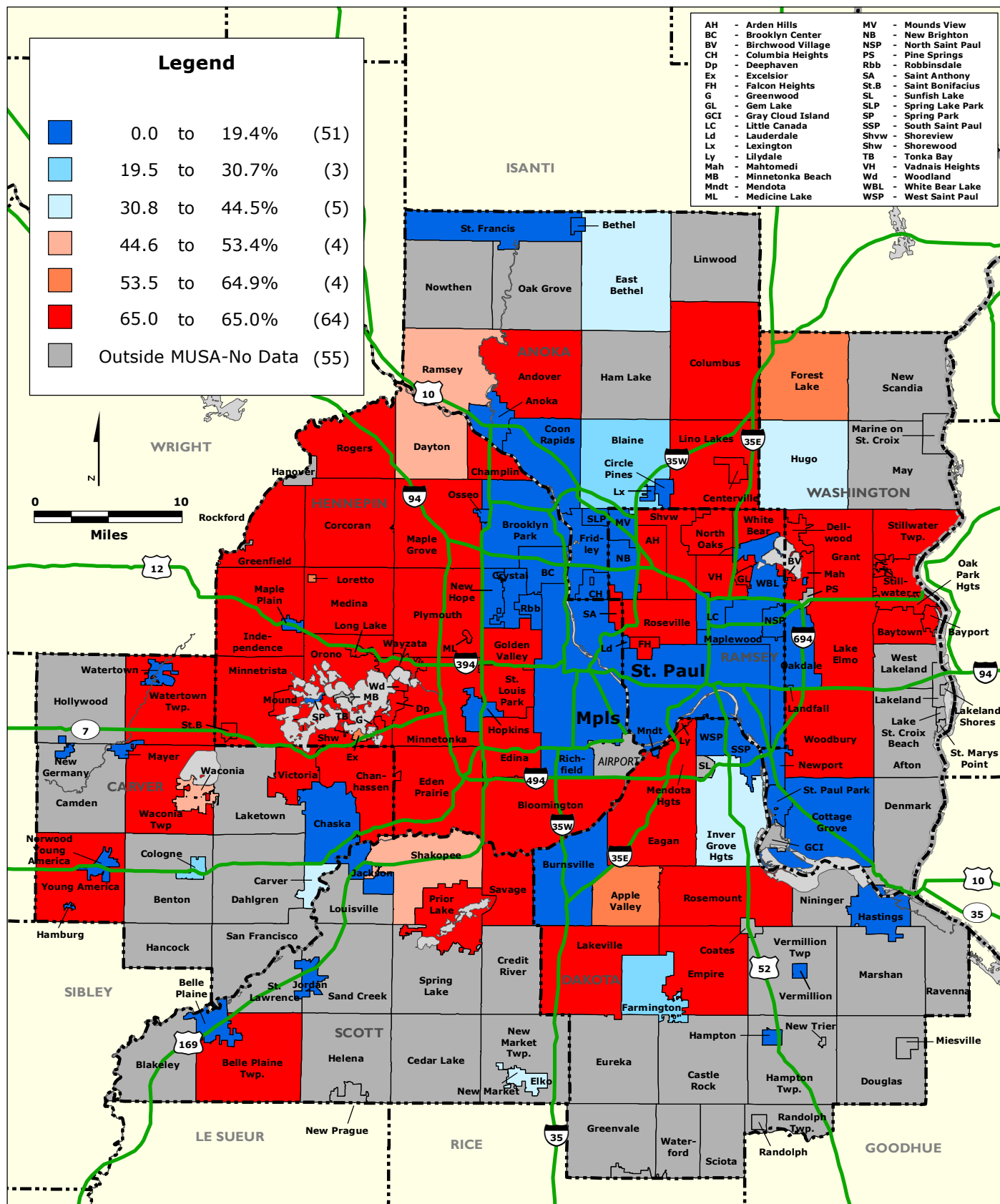
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<sup>44</sup> The correlation coefficients are +.55 for the Map 4 percentages and -.01 for the Map 3 percentages. Local school performance scores were drawn from the data in Metropolitan Council, *Choice, Place and Opportunity: An Equity Assessment of the Twin Cities Region* (2014).

# Map 3: Fair Share Affordable Housing Targets as a Percentage of Projected Growth from 2020 to 2030 with Proportional Adjustments for Low-wage Jobs/Workers, Transit Access and Existing Affordable Housing



## Map 4: Fair Share Affordable Housing Targets as a Percentage of Projected Growth from 2020 to 2030 with Proportional Adjustments for Low-wage Jobs/Workers and Transit Access and Additive Adjustments for Existing Affordable Housing



## **Housing Need Allocations: Affordability Threshold**

The current Housing Need Allocation uses a single affordability threshold, at 60 percent of Area Median Income (AMI).<sup>45</sup> The Plan states that the 2020-2030 Need Allocation will use an upper threshold of 80 percent of AMI, an annual income of \$63,900.<sup>46</sup> It also says the allocation will be broken into three bands, at 30 percent, 50 percent, and 80 percent of AMI.<sup>47</sup>

At present, however, the materials provided by the Need Allocation Subgroup do not indicate that the banding has been applied. The Plan's proposed income banding is an important and laudable addition to the Need Allocations; it is essential that the Council follow through with the Plan's instructions in this regard. MLUPA requires local units to provide their fair share of low- *and* moderate-income housing; a single income band cannot simultaneously capture both categories, particularly when the band is as high as 80 percent of AMI.

## **Goals for Affordable and Lifecycle Housing**

The second measure of the “triumvirate” is negotiated affordable and lifecycle housing goals. The goals are a statutorily mandated component of the Livable Communities Act of 1995 (LCA). As the goals are individually negotiated with participating cities, the Plan does not include specific instructions for determining a city's goal. However, in the past, the negotiated goals have exhibited extremely worrying trends.

These trends can be seen in Maps 5, 6, 7, and 8. Map 5 shows LCA Goals for the period of 1996 to 2010. Map 6 shows LCA Goals in the most recent period, 2011 to 2020. Comparing Maps 5 and 6 immediately reveals a pattern: the suburban goals dropped significantly between the two periods, while the goals of the central cities increased. Map 7 shows the progress each community made towards its goals in the first period. Map 8 shows the progress each community made towards its *rental housing* goal in the first period. The two central cities both met rental housing goals, with Minneapolis only failing to provide the owner-occupied housing it had promised. Meanwhile, many of the suburban goals were missed by 80 percent or more.

As the Plan acknowledges, the Housing Need Allocations are the base for negotiating LCA Goals, after which adjustments are made for other factors, including, ostensibly, concentrations of poverty.<sup>48</sup> However, only two communities in the entire metropolitan area maintain goals of 100 percent of their Need Allocation – Minneapolis and Saint Paul. The vast majority of participating communities have had their goals adjusted downwards from the Need Allocation by 30 percent or more.

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<sup>45</sup> See Metropolitan Council, *Allocation of Housing Needs 2010-2020*.

<sup>46</sup> Housing Policy Plan 50-51.

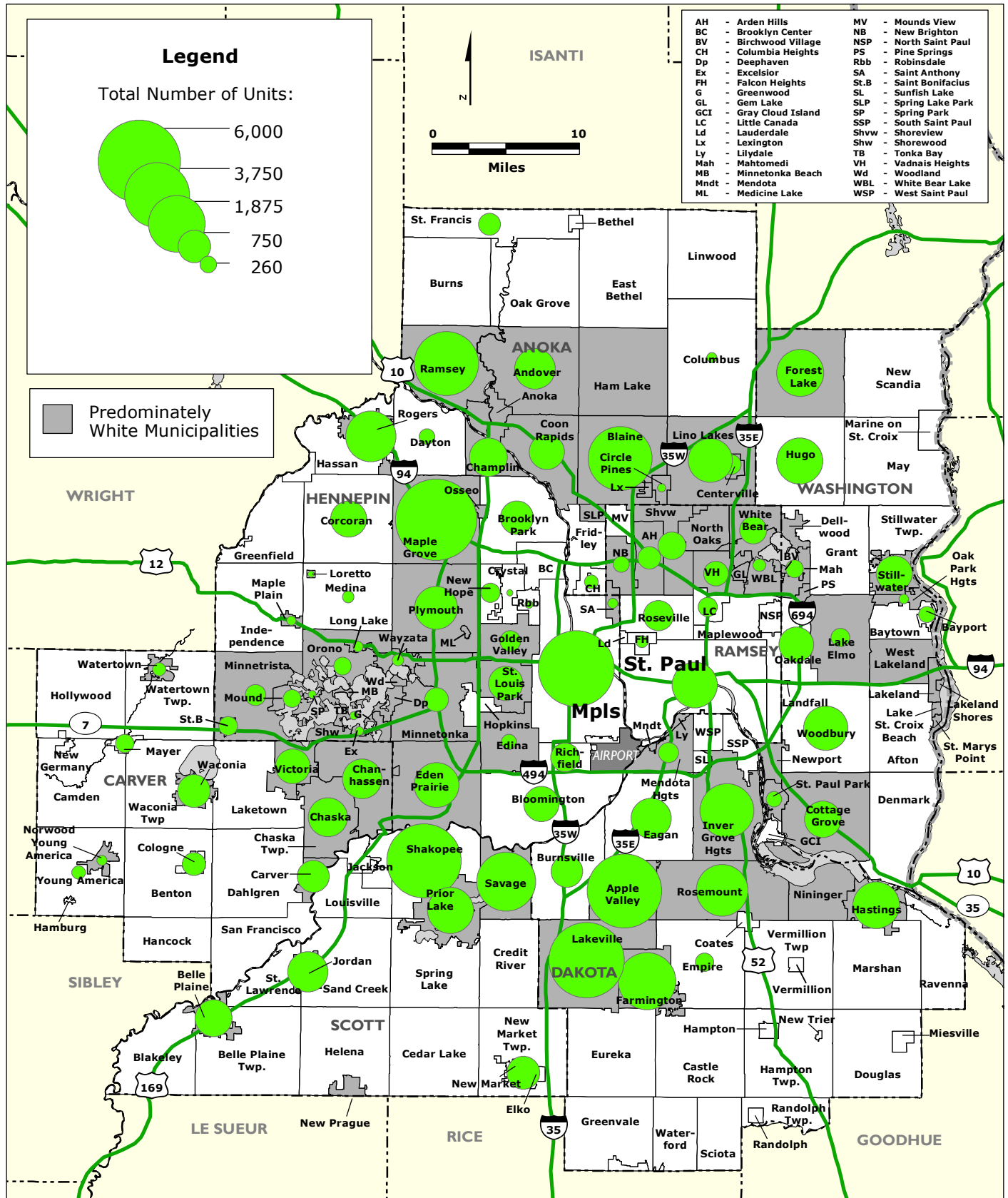
<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 52.

These maps and figures suggest that the LCA Goals have been misused by the Council. The Goals are part of a larger scheme wherein cities are incentivized to develop affordable housing, in order to maintain their eligibility for LCA funding. However, when cities have failed to meet their commitments, the Council has appeared to respond by reducing their commitments. By contrast, the cities that met their commitments were only rewarded with increased future goals. This undermines the incentives envisioned by the LCA, and, from a fair housing perspective, is simply backwards. Furthermore, the Council's supposed willingness to account for concentrations of poverty is undermined by the fact that the two central cities, with the most severe concentrations of poverty, have simply been given their original Need Allocation with no adjustments whatsoever.

## Map 5: MINNEAPOLIS - SAINT PAUL REGION

### Affordable Housing Goals for the Livable Communities Act, 1996-2010

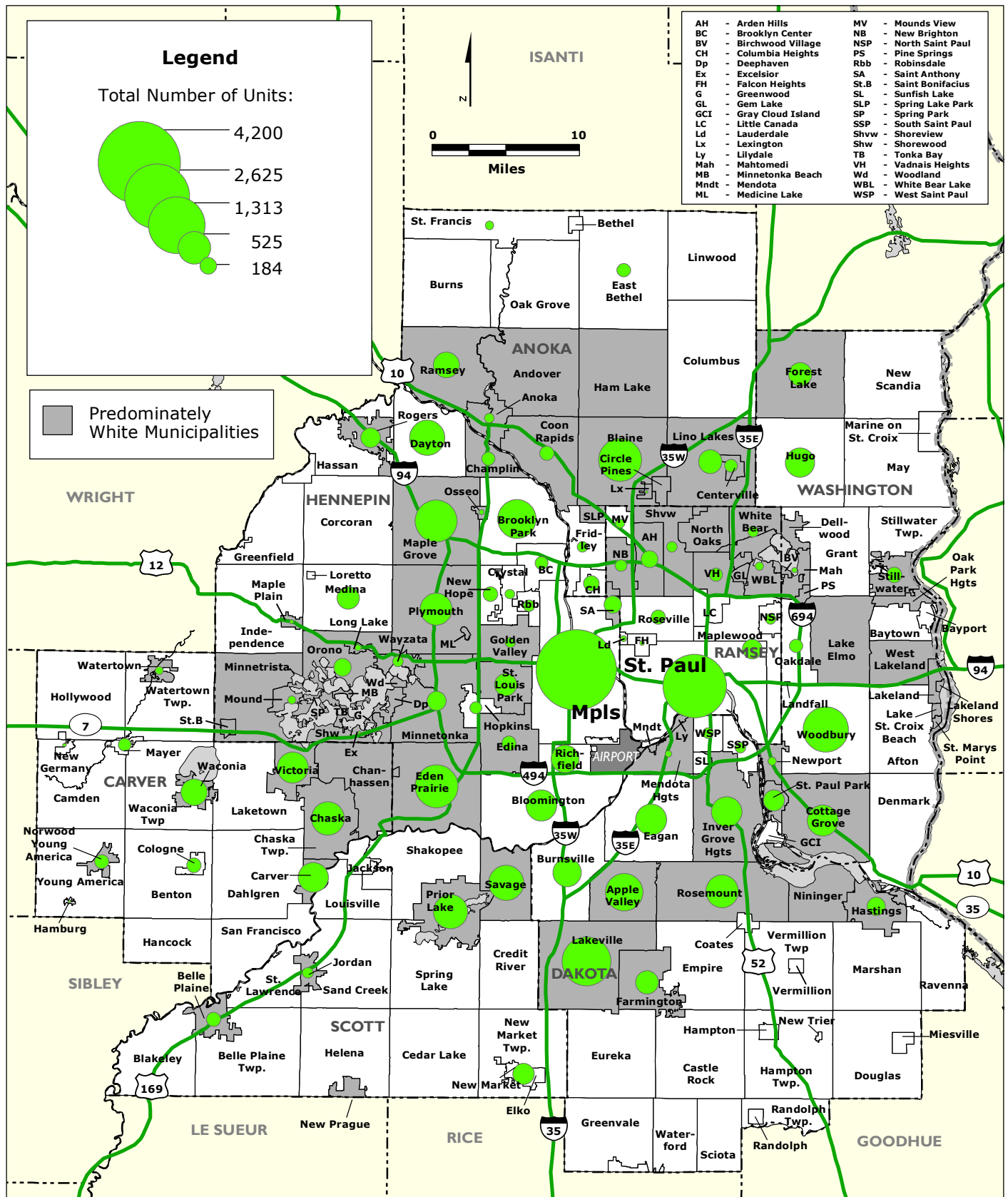


Data Source: Metropolitan Council, TCHousingPolicy.org.



## Map 6: MINNEAPOLIS - SAINT PAUL REGION

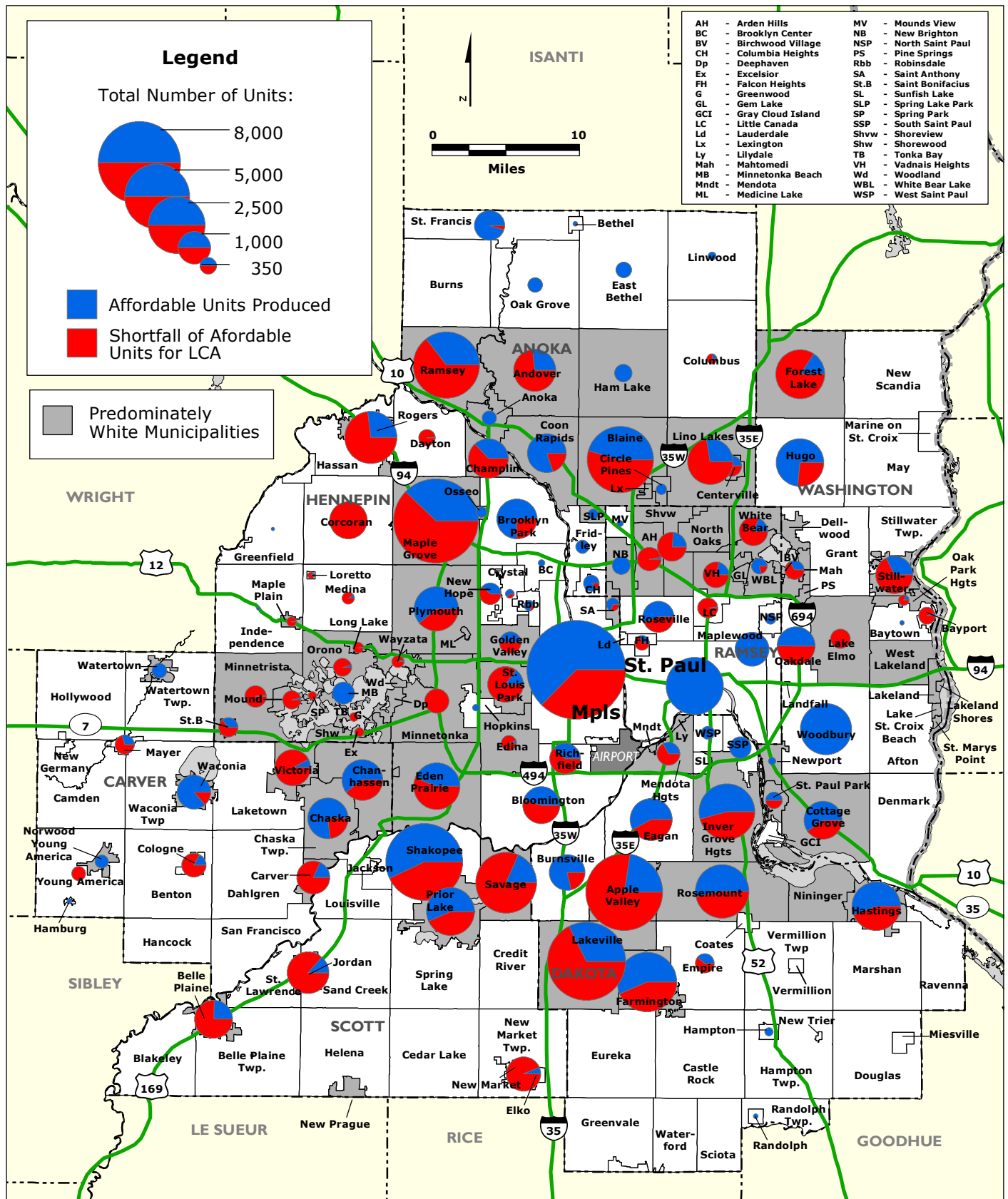
### Affordable Housing Goals for the Livable Communities Act, 2011 to 2020



Data Source: Metropolitan Council, TCHousingPolicy.org.

## Map 7: MINNEAPOLIS - SAINT PAUL REGION

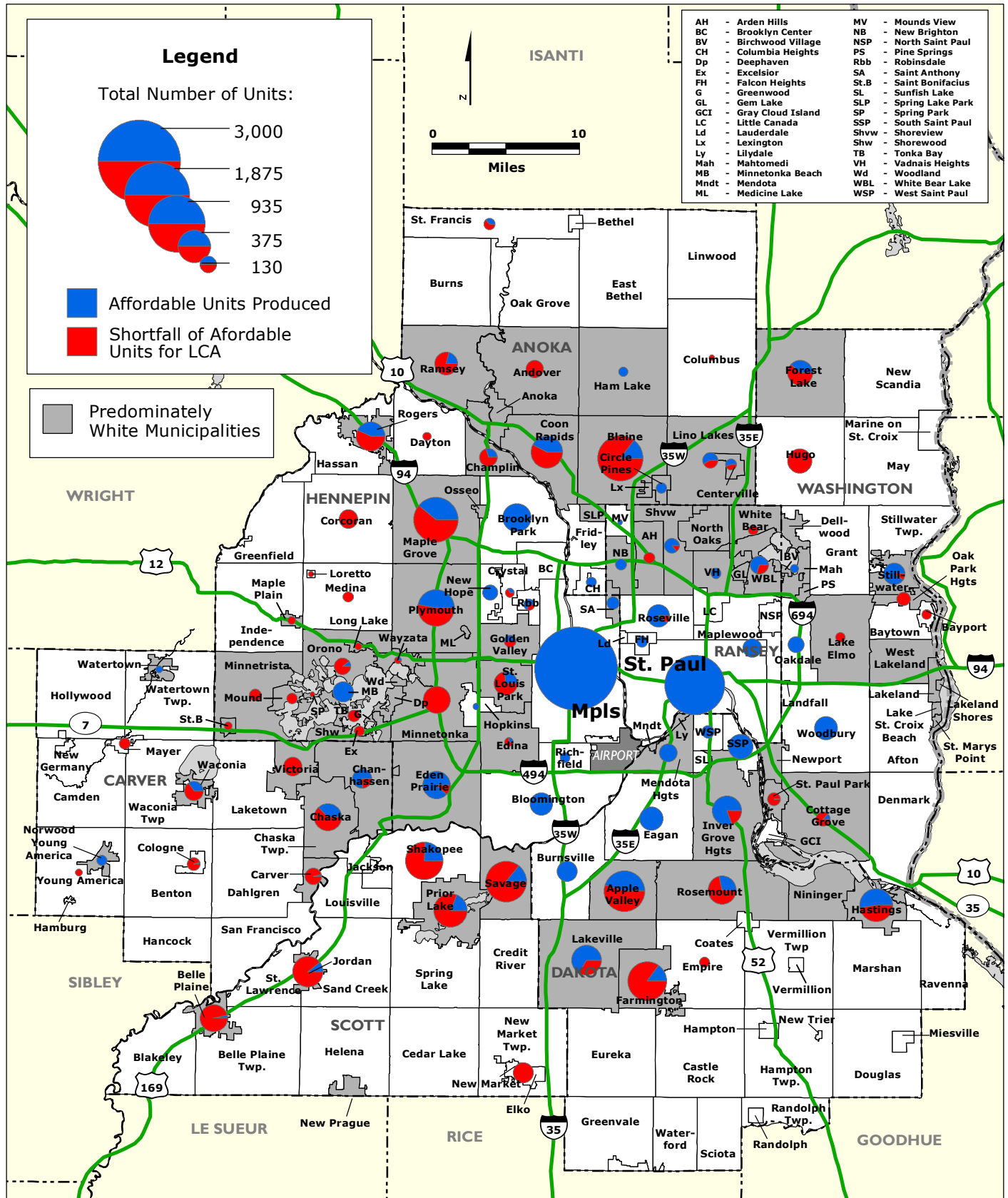
### Affordable Housing Production and Shortfall from LCA Goals, 1996-2010



Data Source: Metropolitan Council, TCHousingPolicy.org.

## Map 8: MINNEAPOLIS - SAINT PAUL REGION

### Affordable Rental Housing Production and Shortfall from LCA Goals, 1996-2010



Data Source: Metropolitan Council, TCHousingPolicy.org.

## Housing Performance Scores

The third measure in the “triumvirate” is the Housing Performance Scores, a system in which the availability of funding is dependent upon an annual score, generated using quantitative measures of housing progress. This system is already used by the Council with regards to LCA funding, although the Plan suggests that it may be extended to additional sources of funding. The Plan also suggests the score criteria may be revised.

The scoring criteria (both current and proposed) heavily emphasize preexisting affordable housing and recent progress towards creating affordable housing.<sup>49</sup> The ultimate effect of this system is to give the highest priority scores to municipalities which already contain heavy concentrations of housing – and frequently, high concentrations of poverty and segregation. In 2013, the two highest-ranked communities, with scores of 98 and 97 out of 100, respectively, were Minneapolis and Saint Paul. Of the 179 additional communities also ranked, most of the diverse inner-ranked suburbs fell in the first quartile, while larger white suburbs like Wayzata, Stillwater, or Golden Valley frequently fell in the second quartile or below.<sup>50</sup> There is a very strong statistical correlation between a city’s Housing Performance Score and nonwhite population – stronger than the correlation between a city’s score and poverty rate, or a city’s score and population.<sup>51</sup>

The Housing Performance Scores have great potential to reduce concentrations of poverty and promote fair housing. They appear to be a vestige of the Council’s Policy 39, which was created in 1985 by the Council’s previous housing policy plan.<sup>52</sup> Policy 39 required the agency to “use its review authority to recommend funding priorities for communities based on their housing performance,” and in particular, to provide or withhold state and federal funding to communities on the basis of their efforts to provide low- and moderate-income housing.<sup>53</sup>

However, the Housing Performance Scores in their current iteration do not replicate Policy 39’s carrot-and-stick approach. Instead, the current approach effectively removes the stick, and as a consequence, the Performance Scores are likely to worsen the problems Policy 39 sought to ameliorate. This is because, rather than being used to help prioritize *all* funding, the scores are only used to prioritize a limited selection of LCA funding, much of which is used to conduct affordable development. (For instance,

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<sup>49</sup> Housing Policy Plan 53-54.

<sup>50</sup> Metropolitan Council, Housing Performance Scores 2013, available at <http://www.metrocouncil.org/getattachment/20eb2650-9d34-4773-a27d-14d0114a07c0/.aspx>.

<sup>51</sup> The correlation for nonwhite population was +.62 in 2012 and 2013. For poverty rate, the figures are +.32 and +.31, respectively. For population, the correlations are +.54 and +.56. However, a multivariate regression run with all three factors confirms that racial composition is the most important of the three, as poverty loses its statistical significance altogether, and population, while remaining statistically significant, accounts for less than a 1-point swing in most cities. By contrast, each additional percentage of nonwhite population in a city tends to increase its Performance Score by over one point.

<sup>52</sup> Metropolitan Council, *Housing Development Guide* 45 (1985) [hereinafter HDG].

<sup>53</sup> *Id.*

between 2011 and 2013, LCA funds contributed to the construction 4,338 affordable units within the metropolitan area.)<sup>54</sup>

As a result, rather than facing a financial incentive to think and plan integratively, communities resistant to change are under little pressure to alter their policies. The cost of maintaining economically or racially segregated living patterns is reduced access to Council funds for affordable housing – funds segregated communities never wanted in the first place. On the opposite end of the spectrum, the central cities and racially transitioning suburbs, where nonprofit developers and housing agencies have concentrated most of the region’s subsidized housing stock, are heavily prioritized for Council funding.

To ensure the Performance Scores reduce, rather than exacerbate, the region’s disparities, the Plan must apply them to a wider range of funding, including funding for non-housing metropolitan systems.

### **Education and Concentrations of Poverty**

Despite identifying, in an earlier section, the manner in which concentrated poverty can diminish school performance and, in a vicious cycle, further accelerate the concentration of poverty, Part III of the Plan contains no substantive mention of education whatsoever.<sup>55</sup> Indeed, the role assigned to the Council in that earlier section suggests that it would rather wash its hands of the matter entirely. Rather than take any direct action itself, it only promises to bring together other groups for unspecified “collaboration” and “empowerment,” agreeing to “[c]onvene housing policy stakeholders,” “[e]xplore how to empower school districts to more effectively comment on local comprehensive plans,” and “[e]ncourage school district planners and local planners to communicate and collaborate.”<sup>56</sup> This omission is unacceptable and could potentially undermine the Council’s other efforts.

Economically and racially integrative housing could dramatically transform the region’s schools, partially eliminating the low-performing, segregated schools which tend to confound attempts to equitably allocate housing. The Institute on Metropolitan Opportunity has run a simulation of the racial make-up of the region’s schools, after more evenly distributing housing subsidies across the region.<sup>57</sup> The simulation shows that if Section 8 voucher usage was distributed evenly across the region and the distribution of households was race-neutral, a total of 5,531 nonwhite students currently in predominantly nonwhite schools would instead be attending a racially balanced school. Adding the effects of equalizing the distribution of LIHTC and Section 8 project-based units increases the total number of nonwhite students in racially balanced schools to 9,729.

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<sup>54</sup> Housing Policy Plan 55.

<sup>55</sup> Housing Policy Plan 44.

<sup>56</sup> *Id.*

<sup>57</sup> This simulation will be described in greater detail in an upcoming report. Institute on Metropolitan Opportunity, *Why Are the Twin Cities So Segregated?* (forthcoming 2014).

This represents a very substantial share of the total number of student moves that would be needed to completely eliminate racially segregated schools (predominantly white as well as predominantly nonwhite) in the region. In fact, it represents between two-third and four-fifths of the number of students who would need to change schools to reach that objective.

The Council already plays an important role in the administration of the region's schools. According to MLUPA, the Met Council "shall adopt a development guide" that "will encompass the physical, social and economic needs of the metropolitan area and those future developments which will have an impact on the entire area" including "the location of *schools*."<sup>58</sup> The Council's authority to coordinate land use in metropolitan area municipalities extends to education: MLUPA requires that local government unit's comprehensive plans, subject to review by the Council, shall contain a statement on "the effect of the plan on affected school districts," and that these comprehensive plans must be submitted to the affected school district for review and comment six months prior to their submission to the Council.<sup>59</sup> Additionally, it suggests that these comprehensive plans contain an intergovernmental coordination process for cooperation with school districts generally and the siting of public schools in particular.<sup>60</sup>

MLUPA also states that for purposes of the statute "local government unit" means "school district," and the Met Council is required to provide notice of rule changes and related hearings to all school districts in the metropolitan area.<sup>61</sup> The law further requires the Council to "construct an inventory" of all schools in the metropolitan area and the unused space within each school; it may then submit comments to the commissioner of education on any school district facility that is proposed in the metropolitan area.<sup>62</sup>

Given its considerable statutory authority over the subject, and the interwoven nature of housing and education, it cannot ignore the Plan's effects on schools – particularly because educational trends will, in turn, affect the Council's housing policy. Ironically, the Plan itself notes the importance of a forthright discussion of the interactions of land use and education: "Often these situations involve discussions that are extremely sensitive; acknowledging the relationship between land use and school districts up front can minimize the potential controversy."<sup>63</sup> The Council must take its own advice, and rather than glossing over education as component of housing policy, incorporate it fully into the Plan.

### **Transit-Oriented Development**

While the Plan implicitly downplays the importance of education, it seems to consider transit a primary – if not *the* primary – consideration in the siting of housing. It

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<sup>58</sup> Minn. Stat. 473.145 (emphasis added).

<sup>59</sup> Minn. Stat. 473.858 (2); Minn. Stat. 473.859 (1).

<sup>60</sup> Minn. Stat. 473.858 (2).

<sup>61</sup> Minn. Stat. 473.121 (6); Minn. Stat. 473.852 (11); Minn. Stat. 473.174 (5).

<sup>62</sup> Minn. Stat. 473.23 (1).

<sup>63</sup> Housing Policy Plan 44.

commits to “focus[ing] housing around emerging transit investments,” and envisions a Council role with a large number of well-specified responsibilities.<sup>64</sup> The Plan describes the Council’s intention to “[p]rovide technical assistance for station area planning,” “[d]efine density expectations for new housing and mixed-used development and redevelopment around transit stations,” “[p]romote transit-oriented development,” and “[d]evelop guidance based on existing best practices, to aid local cities . . . in the identification of high opportunity sites, districts, or areas.”<sup>65</sup> Where the Council only expressed a limp willingness to play a secondary role in the field of housing and education, it enthusiastically commits to integrating housing policy and transportation policy.

In Part III, the Plan discusses the importance of transit-oriented development (TOD), and expresses a desire to maintain the affordability of housing near “transitways and high-frequency bus routes.”<sup>66</sup> While transit undoubtedly plays a role in the region’s future housing distribution, the Plan fails to acknowledge the potentially harmful effects of concentrating affordable housing on transit lines. Many of the region’s transit lines in the region are situated in the urban core, particularly in the central cities of Minneapolis and Saint Paul. These same areas often suffer from concentrations of poverty and segregation. As a result, the desire to build affordable housing on transitways must be tempered with policies designed to avoid creating or worsening existing housing disparities.

The problem is particularly severe with regards to the high-frequency (e.g., LRT and BRT) lines that are the focus of most transit-oriented policies. Map 9, below, shows the geographic extent of existing high-frequency lines within the region. The network is entirely situated within the center of the region; only one route, the 515 bus line, does not primarily serve Minneapolis and Saint Paul. (It instead primarily serves Richfield, a rapidly segregating first-ring suburb.) As Chart 1 illustrates, high-frequency station stops tend to be much more nonwhite than the region as a whole. But the problem grows even worse when housing, transit, and schools are all considered together. As can be seen in Chart 2, over 90 percent of elementary school areas at high-frequency station stops have large nonwhite populations; housing sited at these stops is much more likely to be within a segregated school area than housing elsewhere.

TOD is not necessarily incompatible with fair housing. Transitways frequently pass through high-income as well as low-income areas. But without proactive efforts to ensure that affordable development is well-sited, affordable TOD is often located in low-income neighborhoods, where it generates the least political resistance. In these cases, the benefits of TOD are sometimes used as justification for problematic outcomes. TOD must coexist with integrative fair housing policies; it cannot be allowed to trump them.

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<sup>64</sup> *Id.* at 23-24.

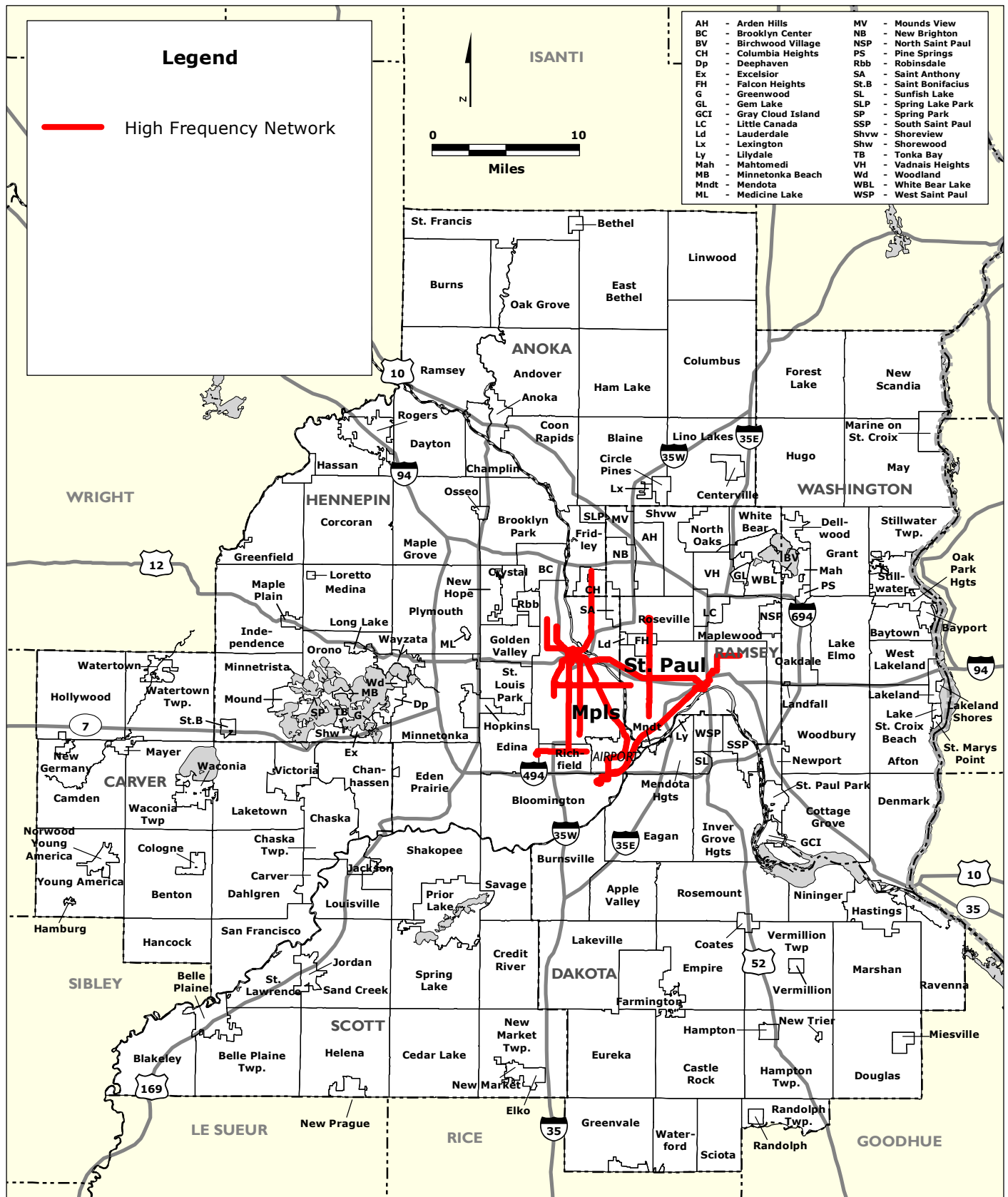
<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 57.

The Plan does not exhibit any awareness of the complexities of this issue. It instead expresses blanket approval of TOD.

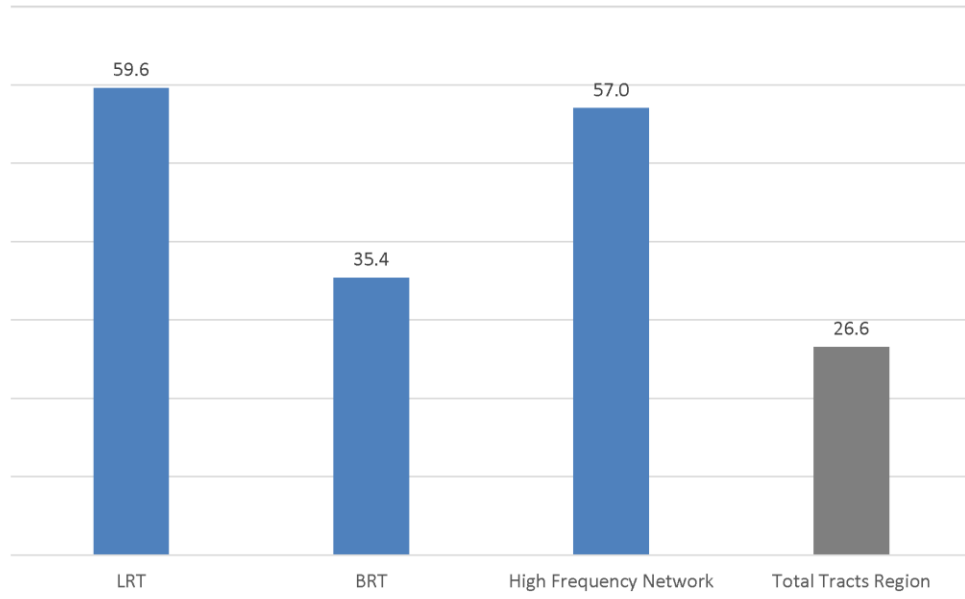


## Map 9: MINNEAPOLIS - SAINT PAUL REGION High Frequency Network in 2014

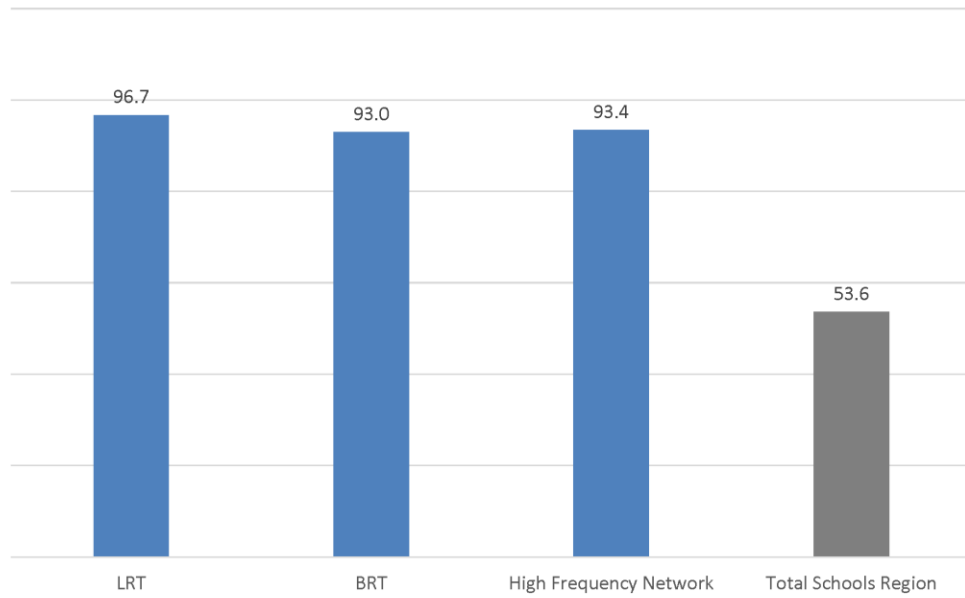


Data Source: Minnesota Department of Education.

**Chart 1: Percentage of Census Tracts With  
≥ 30% Minority at Station Stops, 2010**



**Chart 2: Percentage of Elementary School Areas  
With ≥ 30% Minority at Station Stops, 2013**



## Review of Local Comprehensive Plans

Under MLUPA, the Council is required to review local comprehensive plans for conformity with its own systems plans, compatibility with other communities, and consistency with Council policies.<sup>67</sup> The Plan accurately recognizes that this review must include a review of the local units' "fair share" low- and moderate-income housing obligations and implementation plan.<sup>68</sup> This review, however, must be strengthened if the Council is to fulfill its statutory role as regional coordinator.

The review of local comprehensive plans may be the most fundamental of the Council's many powers. MLUPA imposes on municipalities a number of requirements and responsibilities, including the aforementioned "fair share" requirement. But as the Minnesota legislature recognizes in the preamble of the statute's Land Use Planning subsection, "local governmental units within the metropolitan area are interdependent . . . [and] developments in one local governmental unit may affect the provision of regional capital improvements."<sup>69</sup> In the statute's own words, "there is a need for the adoption of coordinated plans, programs and controls by all local governmental units in order to protect the health, safety and welfare of the residents of the metropolitan area and to ensure coordinated, orderly, and economic development."<sup>70</sup> The statute seeks to address this need by creating a regional authority – the Council – tasked with aligning local development activity.

As the preamble suggests, the coordination of local comprehensive plans, in order to ensure that each city can meet its MLUPA obligations, is perhaps the Council's primary responsibility. It is therefore extremely problematic that the Plan does not include any specific measures to ensure that plans are compatible with each other or consistent with Council policies. Instead, the only Council actions recommended by the Plan are "[w]ork[ing] with local governments and other appropriate stakeholders . . . to determine how to more effectively review . . . local comprehensive plans" and then "[i]ncorporate [the] new review criteria into . . . the Local Planning Handbook."<sup>71</sup> Whatever criteria the review uses, it is meaningless unless the Council is willing to take action upon finding that a local unit's comprehensive plan is incompatible with the policies of other communities or of the Council itself. As MLUPA requires, or at the very least, allows that Council policy plans be incorporated into systems plans to the extent they are rationally related, actions could include the direct revision of the comprehensive plan as "having a substantial impact on . . . a metropolitan systems plan."<sup>72</sup> Alternatively,

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<sup>67</sup> Minn. Stat. 473.175.

<sup>68</sup> Housing Policy Plan 58.

<sup>69</sup> Minn. Stat. 473.851. The Minnesota Supreme Court has also recognized this interdependence. *Village of Burnsville v. Onischuk*, 301 Minn. 137, 152 (1974).

<sup>70</sup> *Id.*

<sup>71</sup> Housing Policy Plan 58.

<sup>72</sup> Minn. Stat. 473.175; see also Minn. Stat. 473.146; Brian Ohm, *Growth Management in Minnesota: The Metropolitan Land Use Planning Act*, 16 HAMLINE L. REV. 359, 380 (1993).

the Council could withhold financial support from the local government in question, a practice it has adopted in the past.<sup>73</sup>

### **Reduce Impediments to Fair Housing**

The Plan contains a section discussing the expansive requirements of the Fair Housing Act (FHA), but downplays both the law's reach and the Council's own authority.<sup>74</sup> Section 3608 of the FHA requires entities receiving housing funding from HUD and other federal agencies to "affirmatively further" fair housing.<sup>75</sup> (In the years 2012 and 2013, the Council received \$58,300,363 and \$57,705,185 from HUD, respectively.) As previously discussed, there is a great deal of legal precedent on the applicability of § 3608 and HUD has released a draft rule clarifying the requirements of the provision.

The Plan, however, does not even mention § 3608, and dismisses the HUD rule, stating that it is "facing political challenges in the U.S. House of Representatives."<sup>76</sup> This is legally unsupportable, and appears to be premised on a bizarre constitutional theory of unicameral executive power. The obligations of § 3608 are enshrined in federal law and exist regardless of HUD guidance or "political challenges." Moreover, the agency's interpretation of the rule is binding, despite political opposition in one house of Congress. The only means through which Congress can alter the requirements of the FHA, and HUD's interpretations of those requirements, is to pass a bill with the approval of both houses of Congress and the President. Any other interpretation would violate the Presentment Clause of the U.S. Constitution.<sup>77</sup>

The Plan further dodges the issue by stating that "[t]he Council and the Council's Housing Policy Plan have a role to play in the larger regional fair housing conversation but lack the authority to tackle this issue alone."<sup>78</sup> It goes on to assign the Council a role characterized by timid commitments: "[p]rovide financial support to regional research," "[c]ollaborate in regional initiatives," "[p]artner with HousingLink to connect renter households with opportunities," "[r]ecognize local efforts to further Fair Housing."<sup>79</sup> The tone is dissembling: "[T]here is no clear agreement who is responsible for ending [discriminatory] practices."<sup>80</sup> The Plan does promise to "includ[e] Fair Housing elements in the Housing Performance Scores," but as discussed above, this would accomplish little unless the scores themselves are put to broader use.<sup>81</sup> The section concludes with minimalistic, noncommittal policy recommendations, centered around a vague promise of

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<sup>73</sup> HDG at 45.

<sup>74</sup> Housing Policy Plan at 67.

<sup>75</sup> 42 U.S.C. § 3608.

<sup>76</sup> Housing Policy Plan 69.

<sup>77</sup> U.S. CONST. art. I, § 7, cl. 2-3.

<sup>78</sup> Housing Policy Plan 69.

<sup>79</sup> *Id.* at 69-70.

<sup>80</sup> *Id.* at 69.

<sup>81</sup> *Id.* at 70.

further discussion: “The Council hopes to engage in a larger regional conversation to develop strategies, roles, and responsibilities to expand fair housing in the Twin Cities.”<sup>82</sup>

This passage, pitifully weak on its own, is nearly unbelievable when viewed in context of the rest of the Plan. The measures discussed above – the Housing Need Allocations, the LCA Goals, the Housing Performance Scores, and the ability to review comprehensive plans – together and separately represent powerful sources of authority to promote fair housing. Not only does the Council have the power to affirmatively further fair housing by leveraging these policy instruments, it is *required* to do so by federal law. After spending dozens of pages describing housing disparities in the metropolitan area and delineating its plans to promote its own housing priorities, the Council simply cannot credibly reverse course and claim to be powerless over the issue. While some fair housing problems – in particular, private market discrimination – may be out of the Council’s direct control, it has the resources to institute protective measures. And other fair housing problems – namely, the distribution and maldistribution of affordable and subsidized housing units – are in fact under the Council’s direct authority.

Without major revisions, the Plan’s cursory dismissal of fair housing almost certainly places it in direct violation of the FHA.

## **V. Eliminated Policies**

The striking weakness of the Plan’s policy section is particularly conspicuous when compared to the strong policies the Plan formally abandons. The 1985 Housing Development Guide, which served as the Council’s previous housing policy, contained aggressive measures designed to combat segregation, reduce disparities, and promote fair housing. (Curiously, the new Plan claims that “Council actions in 1998 and 1999 eliminated [the previous plan] from the metropolitan development guide,” but neither independent research nor multiple information requests have been able to identify the Council actions in question.<sup>83</sup> The Council’s own response suggested that the policies were eliminated by implication through nonenforcement, apparently relying on a legal theory in which regulated entities can assume a law has simply evaporated if it goes unmentioned for a few years. None of this inspires much confidence that the Council will pursue its new Plan with vigor, especially because the new Plan is incomparably more vague.)

The most noticeable absence is the previous policy’s strong enforcement power, which leveraged the Council’s role as funder of regional systems in order to promote better housing outcomes. This was contained in Policy 39, which states:

In reviewing applications for funds the Metropolitan Council will recommend priority in funding based on the local government’s current

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<sup>82</sup> *Id.* at 69.

<sup>83</sup> Housing Policy Plan 14.

provision of housing opportunities for people low and moderate incomes, and its plans and programs to provide such opportunities in the future.<sup>84</sup>

The commentary to Policy 39 states:

Many communities have demonstrated a commitment to expanding their supply of low income and modest cost housing. They take justifiable pride in their efforts to provide housing for their citizens and to help solve regional housing problems. To encourage and support such local efforts, the Council uses review authority to recommend funding priorities for communities based on their housing performance. The priorities reward communities that have provided a full range of housing opportunities. They also help communities compensate for any additional costs for services that might be incurred by subsidized lower income units.

*This policy applies to all local applications for state and federal funding. These funds include community development block grants, and transportation, parks open space and aging grants among others.*<sup>85</sup>

This powerful policy, whose enforcement has long been ignored by the Council on dubious legal grounds, reveals the fundamental weakness of the current Housing Performance Scores and other ostensible attempts to promote a more equal distribution of housing. By applying the policy to *all* local applications for funding, Policy 39 created the strong incentives that are absent from the proposed Plan. Policy 39 also demonstrates how flimsy the Plan's protestations about fair housing truly are – the Council does not lack the authority to affirmatively further fair housing, it only refuses to consider measures which had worked towards that end in the past.

In addition to Policy 39, the Housing Development Guide included Policy 19, which stated that “subsidized housing should not be excessively concentrated, or developed in inferior locations.”<sup>86</sup> The commentary to this policy notes:

Another problem with the concentration of assisted housing is that they increase the proportion of neighborhood residents who depend on public services, thereby undermining the market for retail businesses that help support neighborhood vitality. Subsidized housing for families with children should be provided in scattered site single-family homes, townhouses, duplexes, or garden apartments.<sup>87</sup>

In similar fashion, Policy 23 declared that “a major objective [in the central cities] should be to retain and attract individuals and families with middle and upper incomes to achieve a more balanced income distribution,” and “[s]ubsidized new construction should be used

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<sup>84</sup> HDG at 45.

<sup>85</sup> *Id.* (emphasis added).

<sup>86</sup> *Id.* at 25.

<sup>87</sup> *Id.*

only in economically integrated, scattered site or small-scale developments, and should be located in neighborhoods with limited amounts of lower income housing.”<sup>88</sup>

These policies and their commentaries stand in stark contrast to the current Plan’s approach to same issue. While acknowledging the harms of concentrated poverty, it never once directly warns of the dangers of concentrated subsidized housing, despite the clear logical link between the two phenomena. Rather than adopting policies to avoid this problem, it proposes campaigns to encourage investors to keep an open mind about areas of concentrated poverty: “Public interventions should address educational opportunities, crime, and the quality of the housing stock as well as spread the message that many wonderful, desirable opportunities exist in these neighborhoods...”<sup>89</sup>

The Plan also abandons Policy 35, which gives priority to family housing and economic integration. It declares that “priority will be given to proposals designed to serve families and proposals to further economic integration.”<sup>90</sup> Once again, concentration in low-income neighborhoods is attacked: “[D]evelopments [in] which the majority of units will be subsidized proposed in predominantly low-income neighborhoods are neighborhoods are strongly discouraged.”<sup>91</sup>

The Housing Development Guide included direct instructions to local governments to fight discrimination, such as in Policy 43, which stated:

Local governments should adopt plans, policies and strategies for ensuring nondiscrimination in the sale and rental of housing in their communities. These should include affirmative marketing programs and relocation services in areas of low income minority concentration to broaden housing choice for people who have been discriminated against in the sale and rental housing.<sup>92</sup>

In Policy 44, it anticipated discriminatory lending and suggested a direct remedy: “[The Council will] monitor the Twin Cities home mortgage financing market [and if] adequate information for consumers about new mortgage types is not available, the Council will try to provide this information.”<sup>93</sup>

The proposed Plan only mentions discrimination in passing, primarily in the previously discussed section on fair housing, which is devoted to explaining the Council’s lack of powers to address fair housing. In place of the previous strong instruction for cities to fight discrimination, the Plan now feebly suggests “financial support to regional research . . . *to determine if discriminatory practices are occurring*

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<sup>88</sup> *Id.* at 30.

<sup>89</sup> Housing Policy Plan 30.

<sup>90</sup> HDG at 44.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 48.

<sup>93</sup> *Id.*

and limiting housing choices.”<sup>94</sup> Rather than laying out specific remedies in advance, the Council promises to “[c]ollaborate in regional initiatives to address . . . discriminatory practices.”<sup>95</sup> The regional initiatives in question are left unspecified.

## **VI. Conclusion**

For the reasons described above, the Housing Policy Plan is insufficient to meet the challenges it faces and in dire need of amendment. The Plan also suffers from a critical lack of focus – it appears to pursue every conceivable policy priority at once. It would benefit from cleaner and more comprehensible organizational structure, and a greater willingness to clearly set out priorities and specific policies that achieve them.

Its greatest defect, however, remains its unwillingness to reconsider policies that have failed in the past, even when faced with evidence of severe continuing problems in the Twin Cities housing market. Until it does, the Council will remain out of compliance with MLUPA and with the FHA, will be perpetuating segregation and failing to affirmatively further fair housing, and will be failing in its duty to make the Twin Cities a more equitable and prosperous region.

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<sup>94</sup> Housing Policy Plan 69 (emphasis added).

<sup>95</sup> *Id.*



## Appendix V: IMO Comments on 2011 Minnesota Analysis of Impediments to Fair Housing Choice

## MEMORANDUM

To: Gloria Stiehl  
Minnesota Department of Employment and Economic Development

From: Myron Orfield  
Executive Director, Institute on Race & Poverty, University of Minnesota Law School,  
Mondale Hall Room 150N, 229 19th Avenue South, Minneapolis, MN 55455

Re: Comments on 2011 Minnesota Analysis of Impediments to Fair Housing Choice (Draft Report  
for Public Review, December 14, 2011)

Date: December 31, 2011

These comments are intended to address the draft Analysis of Impediments (AI) in the context of the jurisdiction's greater Consolidated Plan. Given that Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act) and the Community Development Block Grant (CDBG) program, among others, require state and local governments to certify that they are affirmatively furthering fair housing, the validity of a Consolidated Plan is dependent on the validity of a substantively accurate AI.<sup>1</sup>

It is noteworthy that the draft AI was released on December 14, 2011, with a deadline of December 31, 2011. Due to the unusually short deadline, concerned parties had only eleven (11) business days—interrupted by the holidays—to comment on this important document. This brief comment period is insufficient and necessitates reopening the public comment period.

Although federal regulations do not explicitly require jurisdictions to follow the same formal public participation process for revising AIs as Consolidated Plans, HUD “does expect [a] jurisdiction to develop an AI that involves and addresses concerns of the entire community.”<sup>2</sup> Moreover, HUD “encourages State and Entitlement jurisdictions to follow the citizen participation and consultation procedures identified in Subpart B of the Consolidated Plan regulation for communicating with the public on [Fair Housing Planning].”<sup>3</sup> Affirming that “communication with the general public is essential,” HUD also urges jurisdictions to “encourage the participation of diverse population groups and take steps to ensure that communications and activities are accessible to persons with disabilities.”<sup>4</sup> Unfortunately, the process employed in the development of the draft AI is noticeably inadequate.

For example, in its Citizen Participation Plan, Minnesota has committed to a minimum public comment period of 30 days for its Consolidated Plans, pursuant to federal regulations.<sup>5</sup> It is therefore reasonable that Minnesota would also provide a minimum 30-day period for public comment on AIs.

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<sup>1</sup> See, e.g., Memorandum from the Department of Housing and Urban Development, Community Planning and Development Office (CPD) (Sept. 2, 2004), [www.hud.gov/offices/fheo/library/finaljointletter.pdf](http://www.hud.gov/offices/fheo/library/finaljointletter.pdf).

<sup>2</sup> HUD, Fair Housing Planning Guide, vol. 1 § 2.2, 2-5 (1993), *available at* <http://www.hud.gov/offices/fheo/images/fhpg.pdf>.

<sup>3</sup> HUD, *supra* note 2, § 2.5, 2-14.

<sup>4</sup> HUD, *supra* note 2.

<sup>5</sup> State of Minnesota Citizen Participation Plan (July 2006), [http://www.mnhousing.gov/idc/groups/secure/documents/admin/mhfa\\_004263.pdf](http://www.mnhousing.gov/idc/groups/secure/documents/admin/mhfa_004263.pdf); see also 24 C.F.R. § 91.115(b)(4) (2010) (“The citizen participation plan must provide a period, not less than 30 days, to receive comments from citizens and units of general local government on the consolidated plan.”)

Absent reopening the comment period, surrounding evidence suggests this draft AI process was structured to undermine public participation rather than encourage it.

## **I. Overview**

- 1) The AI fails to collect and report data required by HUD regarding racial discrimination and racial segregation or to reference readily available current, relevant local studies on impediments to fair housing choice.**
- 2) The AI fails to identify the most obvious and significant impediments to fair housing choice, most notably:**
  - a. The abandonment of Met Council Policy 13/39, one of the nation's most effective and pro-integrative regional fair housing systems, in favor of an uncoordinated series of racially segregative programs;**
  - b. The 1986 state creation of segregative central city sub-allocators of the Low Income Housing Tax Credit (LIHTC) which unnecessarily intensify segregation in housing and schools;**
  - c. A state Qualified Allocation Plan (QAP) that incents racial segregation by awarding more points to racially segregative projects than racially integrated projects;**
  - d. Failure by relevant state agencies, including Minnesota Housing, the Met Council and the Minnesota Department of Education, to coordinate racial integration of housing and schools as authorized by the state legislature in 1994; and**
  - e. Active state support of a highly fragmented community housing development structure that only builds and advocates for affordable housing development in segregated neighborhoods**
- 3) Based on the foregoing, the draft AI, if submitted in its present form, would amount to a boilerplate or "false" certification to obtain federal funding.**
- 4) Recommendations**
  - a. The state must redraft the AI to satisfy the requirements of the Federal Fair Housing Act**
  - b. The state and its agencies in the metropolitan areas must return to an effective region-wide fair share housing policy. This policy must more clearly link housing choice and school choice to maximize the integrative impact of housing and school integration programs.**
  - c. The state should support the creation of a Regional Fair Housing Center**

- ## **II. The draft AI fails to report on the rapid increase in the racial segregation of local public schools facilitated by the segregative placement of government-supported low-income housing, and neglects to adequately discuss available data on mortgage lending discrimination and racial steering**

### a. Schools and Housing

Under the Fair Housing Act, in areas of minority concentration, “color blindness is not permissible.”<sup>6</sup> The “increase ... of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy.”<sup>7</sup> The Fair Housing Act requires HUD and its grantees to consider the racial balance of schools attended by government-supported housing recipients. The clear implication of this legal requirement is that stably racially integrated schools are a central component of fair housing policy. In this light, HUD’s Fair Housing Equity Assessment Grant Applications require grant recipients, such as the Met Council’s Corridors of Opportunity Program, not only to monitor the racial balance of local schools but their academic performance as well.<sup>8</sup>

On February 23, 2010, Secretary Shaun Donovan clarified HUD’s Fair Housing priorities before Congress, stating:

[S]ustainability also means creating “geographies of opportunity,” places that effectively connect people to jobs, *quality public schools*, and other amenities. Today, too many HUD-assisted families are stuck in neighborhoods of concentrated poverty and segregation, where one’s zip code *predicts poor educational*, employment, and even health outcomes. These neighborhoods are not sustainable in their present state.<sup>9</sup>

Regrettably, the AI does not report or discuss the existing and readily available data regarding racial segregation, particularly rapidly growing racial segregation in public schools.

For example, Orfield and Luce have collected and summarized the relevant data in chapter 3 of *Region: Planning the Future of the Twin Cities* (attached as an APPENDIX A). The data was also published in a peer-reviewed book by the University of Minnesota Press in 2010.<sup>10</sup> The *Region* chapter documents the intertwined growth of segregated schools and neighborhoods and the abandonment of the enforcement of progressive pro-integrative law at all levels of state government. It also clearly documents the segregative placement of all forms of government-supported low-income housing and its segregative effect on schools and neighborhoods. The chapter and all of its recommendations are included by reference in this comment.

Although much of the data in the chapter is from the mid-2000s, the subsequent patterns have been consistent with the trends highlighted in the book. In particular, the number of non-white segregated schools in the region continues to climb, and the distribution of housing from low-income housing programs (LIHTC and Section 8) largely remains the same.

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<sup>6</sup> *Shannon v. United States Dep’t. of Hous. & Urban Dev.*, 436 F.2d 809, 820 (3d Cir. 1970); *see also* 24 C.F.R. § 941.202 (2010) (requiring public housing sites to be accessible to “*educational*, commercial, and health facilities and services” that are “at least equivalent to those typically found in neighborhoods consisting largely of similar unassisted standard housing” (emphasis added)).

<sup>7</sup> *See* 436 F.2d at 821; 24 C.F.R. § 941.202.

<sup>8</sup> *See* Addressing Equity and Opportunity: The Regional Fair Housing and Equity Assessment (FHEA) Grant Obligation (August 2011), [http://www.prrac.org/pdf/Regional\\_FH\\_Equity\\_Assessment\\_HUD\\_Aug\\_2011.pdf](http://www.prrac.org/pdf/Regional_FH_Equity_Assessment_HUD_Aug_2011.pdf).

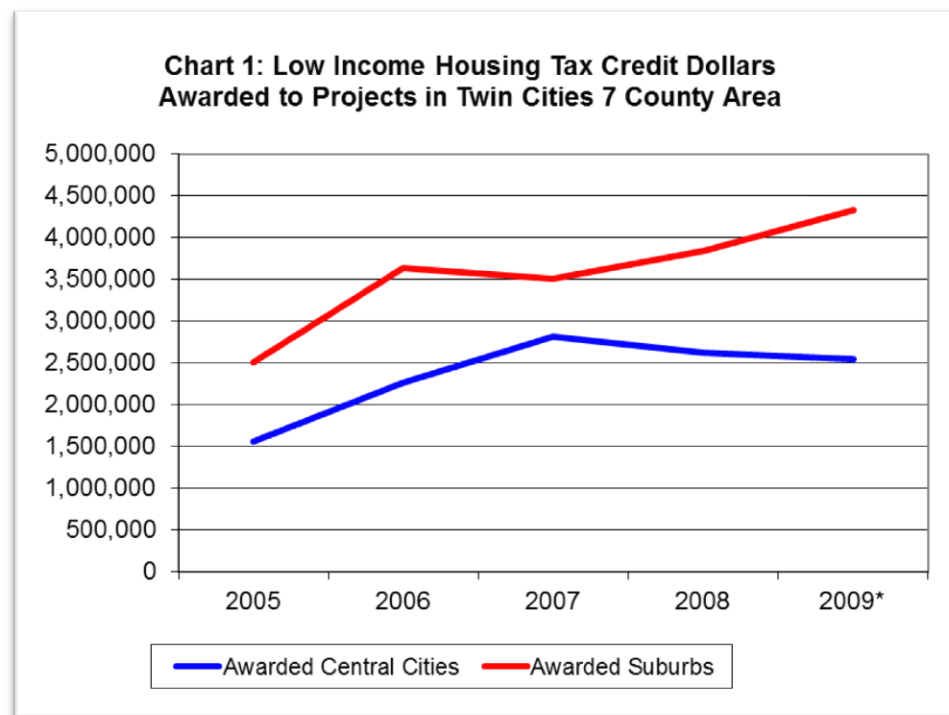
<sup>9</sup> Press Release, HUD, Written Testimony of Shaun Donovan: FY2011 Budget Request for HUD (Feb. 23, 2010) (emphasis added), *available at* <http://portal.hud.gov/hudportal/HUD?src=/press/testimonies/2010/2010-02-23>.

<sup>10</sup> MYRON ORFIELD & THOMAS LUCE, *REGION: PLANNING THE FUTURE OF THE TWIN CITIES* (University of Minnesota Press 2010).

According to Minnesota Department of Education data, the number of elementary schools in the region with very high non-white student percentages (above 80 percent) went from 11 percent in 1995 to 55 percent in 2002. Since 2002, this number has increased further to 83 percent. Put another way, the number of non-white students in highly segregated schools increased dramatically from just 3,419 in 1995 (or 8 percent of all students of color in the region) to 20,074 in 2002 (32 percent) and 31,535 in 2010 (36 percent).

Despite the State of Minnesota's clear fair housing obligations, state fair share law, and a record of pro-integrative location decisions in earlier years, only 17 percent of subsidized units were located in a pro-integrative manner. Eighty-three percent of units were located in a way that contributed to segregation or resegregation rather than promoting integration.

*Region* reports that, in 2002, roughly 50 percent of LIHTC units and 55 percent of Section 8 project units were located in the region's two central cities. Although exact comparisons are not possible with the data available for later years, the percentage of LIHTC credits awarded to suburbs, measured in dollars rather than in units, hovered near 60 percent from 2005 to 2009 (Chart 1).<sup>11</sup> Thus, the central cities with only a quarter of the region's population and deeply racially segregated schools received 50 percent of the tax credit units.



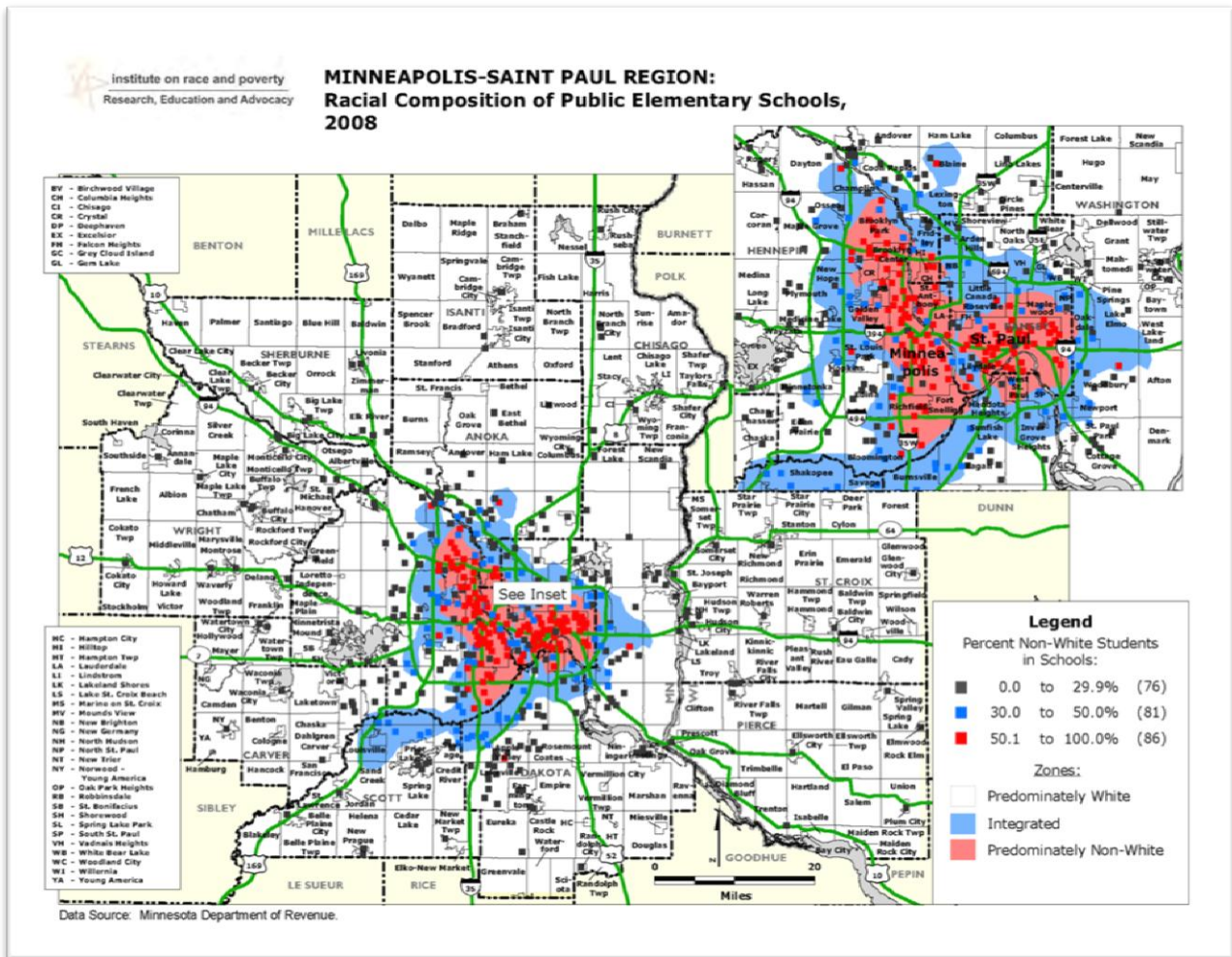
Moreover, subsidized housing units in the suburbs continue to be located primarily in areas where schools are predominantly non-white or resegregating. Map 1 shows the location of elementary schools in the region, divided into three categories—predominantly white (schools with non-white

<sup>11</sup> The housing data cited here and below are from HousingLink's Inventory of Assisted Rental Housing, *available at* <http://www.housinglink.org/inventory/>.

shares between 0 and 30 percent), integrated (non-white shares between 30 and 50 percent), and predominantly non-white (non-white shares greater than 50 percent). The map also shows contours for the areas where schools of each category predominate. In 2007, nearly two-thirds (64 percent) of all subsidized housing units in the region were inside the red contour where nearly all schools were predominantly non-white. Only 17 percent were in the non-shaded area where schools were predominantly white. This part of the region is where opportunity structures were strongest—where jobs were growing most quickly and where low-poverty, high-quality schools predominated.

This pattern is very similar to neighborhood characteristics (as opposed to schools). Despite multiple levels of law and regulation to the contrary, subsidized units are still disproportionately located in neighborhoods of minority concentration (as defined by HUD) in the Twin Cities. In 2007, 57 percent of subsidized units (LIHTC and Section 8 project units) were located in census tracts with more than 30 percent minority residents, more than twice the percentage of the region's population living in those tracts (23 percent in 2010).

Map 1



A simulation by the Institute on Race and Poverty (IRP) shows that the proactive placement of existing LIHTC units in attendance areas for low-poverty schools would have significantly increased school integration.<sup>12</sup> For instance, if LIHTC and project-based Section 8 units were assigned *randomly* by race and placed across the region in the same proportions as the overall population, then the region could have been brought nearly one-third of the way to the goal of integrated schools in 2005.<sup>13</sup> It is conceivable that pro-integrative placement of new units in low-poverty school attendance areas could do most of the work necessary to racially integrate the regional school system.<sup>14</sup> Indeed, in the long run, if housing policy returned to the more pro-integrative strategies of earlier decades, it might be possible to integrate schools with less pro-integrative busing than exists today.

<sup>12</sup> Institute on Race and Poverty, A Comprehensive Strategy to Integrate Twin Cities Schools and Neighborhoods 38–40 (July 2009), [http://www.irpumn.org/uls/resources/projects/Regional\\_Integration\\_Draft\\_3\\_-\\_Long\\_Version.pdf](http://www.irpumn.org/uls/resources/projects/Regional_Integration_Draft_3_-_Long_Version.pdf).

<sup>13</sup> *Id.* at 39.

<sup>14</sup> If a random placement of units does half the work, by logical deduction, a pro-integrative placement of all the units could do all the work.

## **b. Mortgage Lending Discrimination**

While the AI briefly notes an IRP study of mortgage lending,<sup>15</sup> this readily available data should have been a more substantial part of its analysis. One of the study's recommendations is a regional fair housing center. The mortgage lending report and its recommendations are included by reference in these comments and are attached as APPENDIX B.

## **c. Racial Steering**

At a public meeting at the Institute on Race and Poverty in 2008, the superintendents of the Robbinsdale, Hopkins, Eden Prairie, Burnsville and Rosemount, and Richfield suburban school districts publicly disclosed that racial steering of black, Latino, and white homebuyers in their school districts and across the metropolitan areas was rampant.<sup>16</sup> Their statements have been recorded and are publicly available. Each superintendent stated that he or she had repeatedly scheduled meeting with offending agents, but the practice was so ubiquitous that unredressed illegal conduct nevertheless undermined efforts to promote and maintain local school integration.<sup>17</sup>

Specifically, these superintendents described the following pattern: As middle-income non-white families seek neighborhoods of greater opportunity, their housing choices are exceptionally constrained compared to whites of similar income, credit history, and education. This is consistent with the mortgage data cited in IRP's mortgage study incorporated by reference in these comments.<sup>18</sup> Middle-income non-white households have more residential choice than low-income non-whites, but less than comparable white households. They are seriously affected by steering and mortgage lending discrimination by white sellers and renting agents. Because middle-income minority families often become the first to integrate white neighborhoods, the local elementary schools often become diverse long before the neighborhood does. After a beachhead of diversity is established, realtors steer minority families seeking better schools toward these newly diverse schools, and steer white families away from them. Fair housing studies have detected similar patterns in Teaneck, New Jersey and Grosse Pointe, Michigan.

Another example of this conduct occurred as the Eden Prairie school district attempted to draw integrated school boundaries. The Minnesota ABC television news affiliate, KSTP-TV, aired a local real estate agent arguing that, as a real estate professional, he believed that integrated schools would decrease the housing values in that school district and that he told this to prospective buyers personally.<sup>19</sup>

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<sup>15</sup> Institute on Race and Poverty, *Communities in Crisis: Race and Mortgage Lending in the Twin Cities* (February 2009), [http://www.irpumn.org/uls/resources/projects/IRP\\_mortgage\\_study\\_Feb.\\_11th.pdf](http://www.irpumn.org/uls/resources/projects/IRP_mortgage_study_Feb._11th.pdf).

<sup>16</sup> See Institute on Race and Poverty, *Region 2008: Law, Policy, and the Future of the Twin Cities* (October 23, 2008) <http://www.irpumn.org/website/region2008/>.

<sup>17</sup> See *id.*

<sup>18</sup> See *Communities*, *supra* note 15.

<sup>19</sup> See KSTP-TV, *Are Eden Prairie School Changes Affecting Property Values?* (broadcast Apr. 18, 2011), available at <http://kstp.com/news/stories/S2071312.shtml?cat=1>; see also Alex Hall, *A Value Judgment*, EDEN PRAIRIE NEWS, Apr. 14, 2011, at A1 (quoting realtor Scott Carlston); Response by Thomas Luce, Research Director, Institute on Race and Poverty (on file with author) (outlining the inaccuracies of data cited by realtor).



### **III. The AI prima facie fails its obligation to identify the most significant impediments to fair housing choice**

The draft AI should have included “a comprehensive review of a State or Entitlement jurisdiction’s laws, regulations, and administrative policies, procedures and practices,” and “an assessment of how those laws, etc. affect the location, availability, and accessibility of housing.”<sup>20</sup> By failing to mention several of the most important state agencies and local governments with duties and powers to affirmatively further fair housing, the AI *prima facie* fails in this obligation.

#### **a. The AI fails to report on the abandonment of Met Council Policy 13/39, one of the nation’s most effective and pro-integrative regional fair housing systems, in favor of an uncoordinated series of racially segregative programs**

From 1970–86, the Twin Cities Metropolitan Council (Met Council), together with the state housing finance agency, implemented a regional fair share housing program through coordination of its land use and housing policies.<sup>21</sup> In direct response to the passage of the Federal Fair Housing Act and the promulgation of its siting rules, the first school desegregation lawsuit against the state of Minnesota,<sup>22</sup> and the New Jersey Supreme Court’s decision in *Mount Laurel*,<sup>23</sup> the Met Council (pursuant to its statutory and constitutional duty to achieve a fair share distribution of affordable housing) and the Minnesota Housing Finance Agency (now Minnesota Housing) created and operated the most effective suburban affordable housing plan with the greatest pro-integrative civil rights effect in the nation’s history.<sup>24</sup> This program, known as Policy 13/39, operated under both the fair share requirement of the Minnesota Land Use Planning Act and federal A-95 review power with clear guidance from HUD.<sup>25</sup> Both state and federal law provided an independent statutory basis to support the program.

Through Housing Policy 13 (later renumbered Policy 39), the Met Council used its authority and the withholding of a wide variety of federal and state funds to encourage affordable housing development in the suburbs.<sup>26</sup>

Starting in 1974, the Met Council received a large influx of federal housing funds under the Section 8 New Construction Program.<sup>27</sup> The Met Council’s progressive housing policies were further

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<sup>20</sup> See HUD, *supra* note 2, § 2.3, 2-7 (Defining the AI).

<sup>21</sup> The Twin Cities’ fair share program during this period was “one of the highest-performing regional programs in the entire nation.” Edward G. Goetz, Karen Chapple & Barbara Lukermann, *The Rise and Fall of Fair Share Housing: Lessons from the Twin Cities*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* 251 (Xavier de Souza Briggs ed., 2005). For evidence of the success of the program during the 1970s, see Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 *FORDHAM URB. L.J.* 877, 919–20 (2006).

<sup>22</sup> See *Booker v. Minneapolis Sch. Dist. No. 1*, 351 F.Supp. 799 (D. Minn. 1972) (federal equal protection boundary violation).

<sup>23</sup> *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

<sup>24</sup> See Robert H. Freilich & John W. Ragsdale, Jr., *Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region*, 58 *MINN. L. REV.* 1009 (1974) (Freilich and Ragsdale drafted the Metropolitan Land Use Planning Act, which was revolutionary for its time.).

<sup>25</sup> See 24 C.F.R. § 941.202 (2010); Orfield, *supra* note 21, at 920.

<sup>26</sup> Orfield, *supra* note 21.

supported by HUD's national fair housing initiative. In 1976, HUD initiated its Area-wide Housing Opportunity Program (AHOP) to encourage fair-share housing across regions.<sup>28</sup> The Met Council was particularly well positioned to take advantage of this program and immediately received additional funds from HUD to support its fair housing efforts.<sup>29</sup> As a result, the Met Council's fair share housing program increased the region's suburban share of affordable housing units from 18 percent in 1975 to 41 percent in 1983.<sup>30</sup> During the same years, the number of low-income family housing units in the suburbs rose from 1,878 to 14,712.<sup>31</sup> Virtually all of these units were built within the attendance areas of predominantly white, middle-class, and high-achieving schools. No community in the United States had ever moved so rapidly and effectively in response to the Fair Housing Act and the civil rights movement.<sup>32</sup>

The Met Council is the largest and most powerful metropolitan government in the United States.<sup>33</sup> It implements the Metropolitan Land Use Planning Act, which gives it the power to review local comprehensive land use plans and invalidate plans that are inconsistent with Metropolitan systems plans and other policy plans with similar legal status.<sup>34</sup> Local zoning plans must conform to a comprehensive plan.<sup>35</sup>

The Met Council also has a state statutory duty<sup>36</sup>—and as an agency of the state, a constitutional duty<sup>37</sup>—to set fair share goals for each community in the Twin Cities metropolitan area to provide for its fair share of the region's affordable housing needs. For almost twenty years, the Met Council and Minnesota Housing together have set and achieved the fair share goals.<sup>38</sup>

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<sup>27</sup> *Id.* at 921.

<sup>28</sup> AHOP was a visionary program created by George Romney (Mitt Romney's father), President Nixon's Secretary of Housing and Urban Development. Its creation is detailed in a recent book by Charles M. Lamb, *Housing Segregation in Suburban America Since 1960* (2005).

<sup>29</sup> Orfield, *supra* note 21, at 922.

<sup>30</sup> Goetz et al., *supra* note 21. The early 1980s saw a reversal of the program's fortunes. The Reagan administration's repeal of Circular A-95 eliminated the Met Council's authority to review local applications for federal grants. As a result, the Met Council lost an important tool for leveraging local compliance with its regional land use and housing plans. Similarly, HUD's dramatic budget cuts experienced in the early 1980s decreased the federal housing subsidies available to the Met Council to implement its regional fair share housing policies. Changes in the leadership of the Met Council, as well as changes in the region's population demographics, also contributed to the Met Council's gradual retreat from its former regional fair share housing policies. For a detailed discussion of the decline of the program, see Goetz et al., *supra* note 21, at 251–53.

<sup>31</sup> Orfield, *supra* note 21, at 919–24.

<sup>32</sup> MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* 49–52 (1997); Orfield, *supra* note 21, at 919.

<sup>33</sup> See Myron Orfield & Thomas Luce, *Governing America's Metropolitan Areas, Spatial Policy and Regional Governance*, in *MEGAREGIONS: PLANNING FOR GLOBAL COMPETITIVENESS* (Catherine L. Ross ed., 2009).

<sup>34</sup> Brian W. Ohm, *Growth Management in Minnesota: The Metropolitan Land Planning Act*, 16 *HAMLIN L. REV.* 359 (1993).

<sup>35</sup> Minn. Stat. § 473.858 (2010).

<sup>36</sup> Minnesota statute section 473.859 subdivision 2 provides: “a land use plan shall also include a housing element containing standards, plans and programs for providing adequate housing opportunities to meet existing and projected local and regional housing needs, including but not limited to the use of official controls and land use planning to promote the availability of land for low and moderate income housing.” Minn. Stat. § 473.859 subd. 2 (2010).

<sup>37</sup> Although the Minnesota Supreme Court has not yet spoken on this subject, it is likely that they would follow *Southern Burlington County NAACP v. Mount Laurel Twp.*, 336 A.2d 713 (1975) and 456 A.2d 390 (1983). Most jurisdiction use *Mount Laurel* to interpret statutory “fair share” obligations.

<sup>38</sup> See Orfield, *supra* note 21.

Both the Met Council and Minnesota Housing are subject to the Federal Fair Housing Act duty to affirmatively further fair housing. This law requires them to use their “immense leverage” to create “integrated and balanced living patterns.”<sup>39</sup> In the process of siting housing, the Fair Housing Act requires all entities subject to the law to consider the racial balance of the schools attended by those living in government-supported housing.<sup>40</sup> It is *presumptively* improper to site affordable housing in a way that does not increase school integration on a metropolitan level.

Although never repealed, in the mid-1980s, the Minnesota Legislature effectively ended the program at the behest of central city politicians, housing officials, and city-based developers—not the suburbs. This coalition sponsored successful legislation that mandated that a disproportionate share of units be built in poor central city neighborhoods through the creation of central city sub-allocators and Qualified Allocation Plan (QAP) guidelines that incent segregation rather than integration. The Commissioner of the Minnesota Housing Finance Agency at the time opposed this pro-segregative change.<sup>41</sup>

As a result, ten years after Policy 13/39 was abandoned in the early 1980s, Minneapolis, HUD, and the Met Council were sued for violating fair housing siting principles (the *Hollman* case) and agreed to settle with the plaintiffs.<sup>42</sup> In 1995, the legislature reaffirmed the council’s authority over suburban affordable housing, and in so doing encouraged the Met Council to again negotiate fair share housing goals with the region’s municipalities.<sup>43</sup>

Although the Met Council increased its support of suburban affordable housing under the Livable Communities Act,<sup>44</sup> the Met Council and Minnesota Housing have never again fully and coordinated their activities in order to fulfill their joint federal civil rights duties. Shortly after the *Hollman* litigation was settled, the state of Minnesota, HUD, and the Met Council were sued for segregation in the state’s school system, and the state again settled the case.<sup>45</sup>

The Met Council’s most recent housing plan does not mention race and gives the greatest affordable housing goals to Minneapolis and St. Paul, which have the most segregated neighborhoods and schools. Although it has a statutory duty to review school capital plans for their racially segregative impact, the Met Council’s plan fails to do so and makes no effort to coordinate its activities with the Department of Education to facilitate school integration under Minnesota Rule number 3535

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<sup>39</sup>NAACP v. Sec’y of Hous. and Urban Dev., 817 F.2d 149, 156 (1st Cir. 1987) (Breyer, J., holding that Title VIII imposed a duty on HUD beyond simply refraining from discrimination).

<sup>40</sup>See Shannon v. United States Dep’t of Hous. & Urban Dev., 436 F.2d 809, 822 (3d Cir. 1970); see also 24 C.F.R. § 941.202 (2010) (requiring public housing sites to be accessible to “educational, commercial, and health facilities and services” that are “at least equivalent to those typically found in neighborhoods consisting largely of similar unassisted standard housing” (emphasis added)).

<sup>41</sup> Interview with James Solem, Former Commissioner of the Minnesota Housing Finance Agency (December 26, 2011). Solem was the Commissioner in 1986.

<sup>42</sup> See *Hollman v. Cisneros*, Civ. No. 4-92-712 (D. Minn. Apr. 21, 1995); Timothy L. Thompson, *Promoting Mobility and Equal Opportunity: Hollman v. Cisneros*, 5 J. AFFORDABLE. HOUSING & COMMUNITY DEV. L. 237, 248 (1996).

<sup>43</sup> See *Hollman*, Civ. No. 4-92-712; Thompson, *supra* note 42.

<sup>44</sup> See MINN. STAT. § 473.25 et. seq. (2011) (The Livable Communities Act).

<sup>45</sup> See Myron Orfield, *Choice, Equal Protection, and Metropolitan Integration: The Hope of the Minneapolis Desegregation Settlement*, 24 LAW & INEQ. 269, 310 (2006). The Met Council and HUD were able to dismiss the school case because the federal courts considered they claim were precluded by the *Hollman* settlement. *Id.* at 313; see also *NAACP v. Metro. Council*, 125 F.3d 1171, 1172 (8th Cir. 1997); *Xiong v. State of Minnesota*, 195 F.3d 424, 425 (8th Cir. 1999).

(discussed below). The 2009 Analysis of Impediments to Fair Housing Choice submitted by the Fair Housing Council of the Twin Cities Region (not the Met Council) was prepared by the same consultant that prepared the state plan, and it has all the same flaws.

**b. The AI fails to report the 1986 state creation of segregative central city sub-allocators of the Low Income Housing Tax Credit which unnecessarily intensifies segregation in housing and schools**

In 1986, LIHTC became the dominant form of federal subsidy for low-income housing. Rather than continuing Policy 13/39 and fully coordinating the award of tax credits to support the Met Council's pro-integrative fair share goals, the State of Minnesota created a sub-regional allocation system that encourages racial segregation rather than promotes racial integration.<sup>46</sup> Almost all of the housing allocated to sub-allocators has been sited in concentrated minority areas in which the public schools are completely racially and economically segregated and academically low-performing.

**c. The AI fails to report that the state Qualified Allocation Plan (QAP) incents racial segregation by awarding more points to racially segregative projects than racially integrated projects**

The Federal Fair Housing Act applies to the Low Income Housing Tax Credit. As such, State agencies must collect racial data on the location and occupancy of tax credit units.<sup>47</sup> The draft AI fails to report this information, and the QAP does not mention either race or the Fair Housing Act. Contrary to law, the QAP creates a scoring system that encourages racial segregation and the placement of housing projects in areas of minority concentration, rather than fulfilling its clear obligation to affirmatively further fair housing and integrate housing.

For example, Minnesota awards *no points* for racial integration at all. It awards only 1 or 2 points for projects in low-poverty areas. In contrast, virtually all of the other criteria—well over 100 points—appear to promote the placement of units in areas of minority concentration or resegregation. For example, “readiness to proceed” favors areas with less community opposition (24 points). Moreover, “rehabilitation of existing structures” (10 points), “being part of community revitalization plan” (2 points), “using existing water or sewer” (10 points), “foreclosed properties” (10 points), “preservation of existing credits” (10 points), “permanent housing for the homeless” (110 points), “minimizing transportation costs” (3 points), “serves lowest income tenants” (13 points), and “local philanthropic contribution” (which favors local Community Development Corporations operating in segregated neighborhoods) (10 points) seem to favor core city projects over areas with high-performing and predominantly white or integrated schools.<sup>48</sup>

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<sup>46</sup> See Minn. Stat. § 462A.222, subd. 1 (creating Minneapolis and St. Paul as sub-allocators of the tax credit) and subd. 2 (allocating the credit to both central cities at 1.25 times population with additional allocation points based on the number of welfare recipients).

<sup>47</sup> See *In re Adoption of 2003 Low Income Hous. Tax Credit Qualified Allocation Plan*, 848 A.2d 1, 15–17 (N.J. Super. Ct. App. Div. 2004).

<sup>48</sup> See Minnesota Housing, Self-Scoring Worksheet, 2012 Housing Tax Credit Program, [http://www.mnhousing.gov/idc/groups/multifamily/documents/webasset/mhfa\\_010882.rtf](http://www.mnhousing.gov/idc/groups/multifamily/documents/webasset/mhfa_010882.rtf).

Furthermore, even housing growth (10 points), which would generally appear to be pro-integrative, actually prioritizes housing in Minneapolis and St. Paul that have recently lead new housing starts.

Most recently, in 2010, the state agency added criteria for “transit oriented development” (3 points),<sup>49</sup> which, if given effect, could promote and dramatically increase school segregation, particularly along the Central Corridor between Minneapolis and St. Paul.

### **1. Areas of Concern along the Central Corridor and Sustainable Communities Initiative**

The Central Corridor includes a highly diverse set of neighborhoods and schools. However, there is a sharp divide along the Corridor, evident in both general population and school data. The divisions are sharpest among schools. Schools in the eastern half of the corridor serve very few white students, where students of color constitute overwhelming majorities in all elementary schools east of (and including) Hancock Elementary, located at the center of the Corridor. In contrast, the two schools immediately west of Hancock, are both racially diverse and racially integrated.

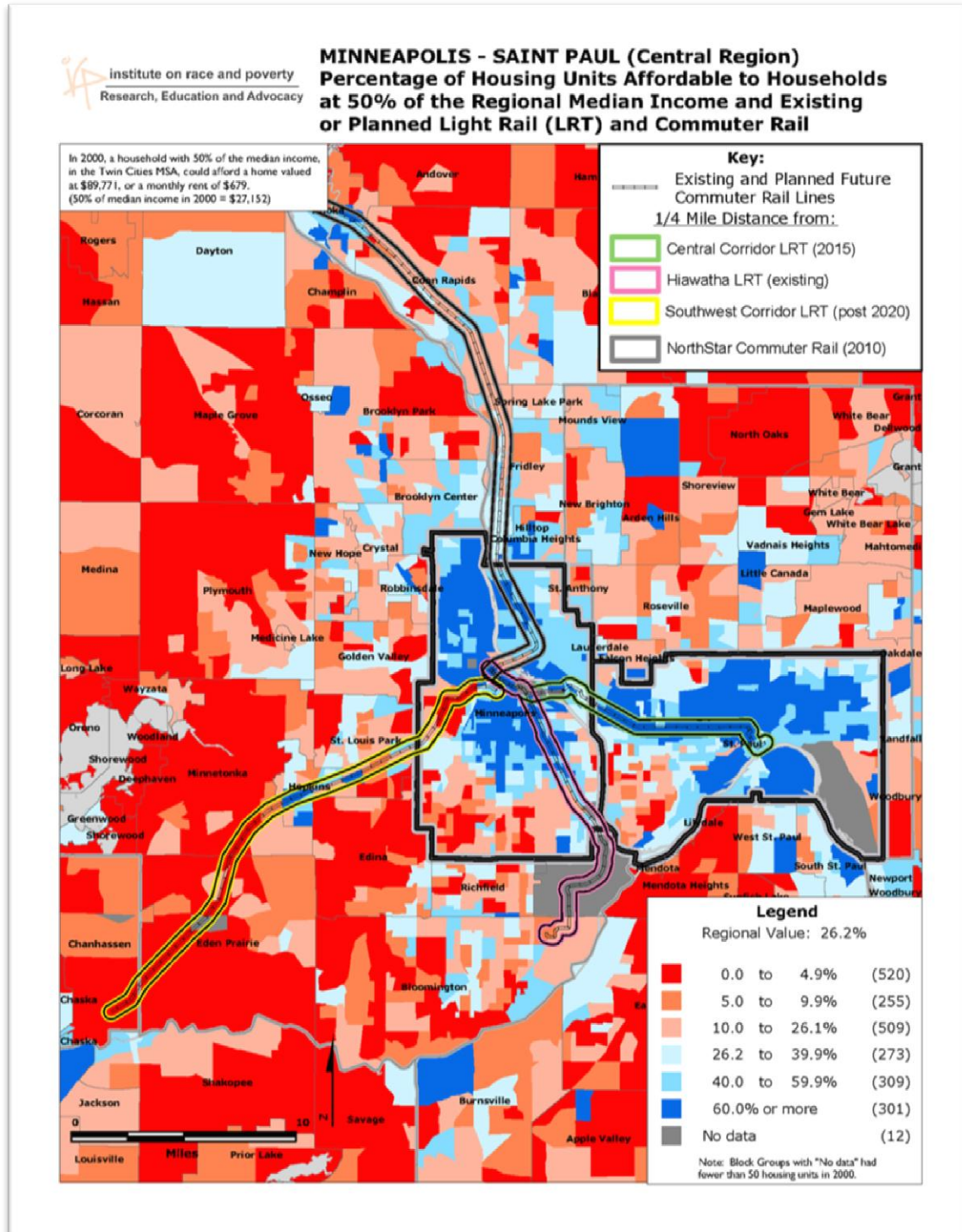
There is a large public advocacy effort lead by Community Development Corporations(CDCs) employing a Sustainable Communities Framework to advocate for increased development of low-income family housing in neighborhoods already saturated with the government-subsidized low-income housing and dominated by segregated low-performing schools. Nonetheless, this effort relies on questionable data regarding gentrification and its negative impacts and does not address fair housing issues.

Map 2 shows that the Central Corridor already has the highest regional share of market-rate affordable housing.

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<sup>49</sup> *See id.*

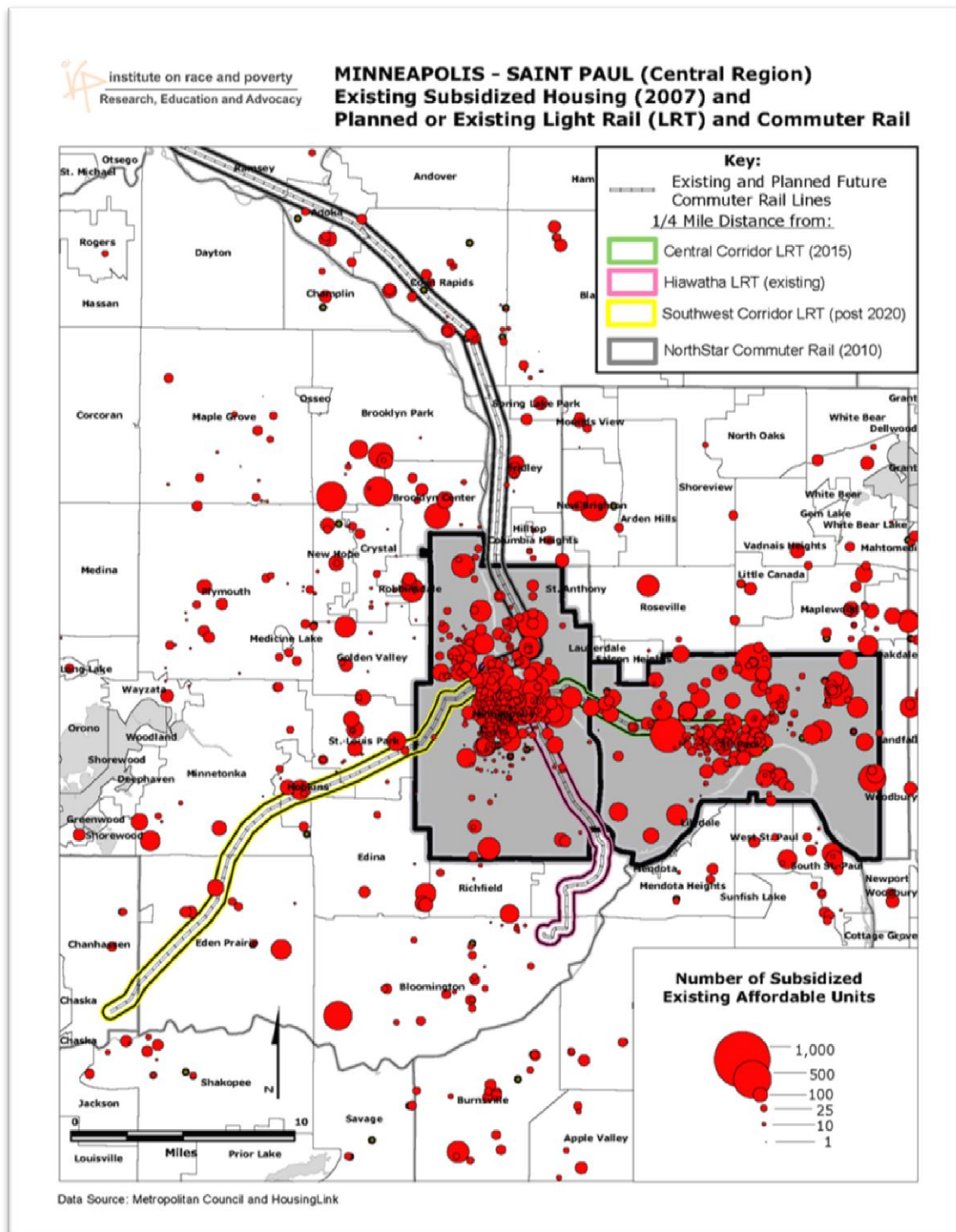
Map 2



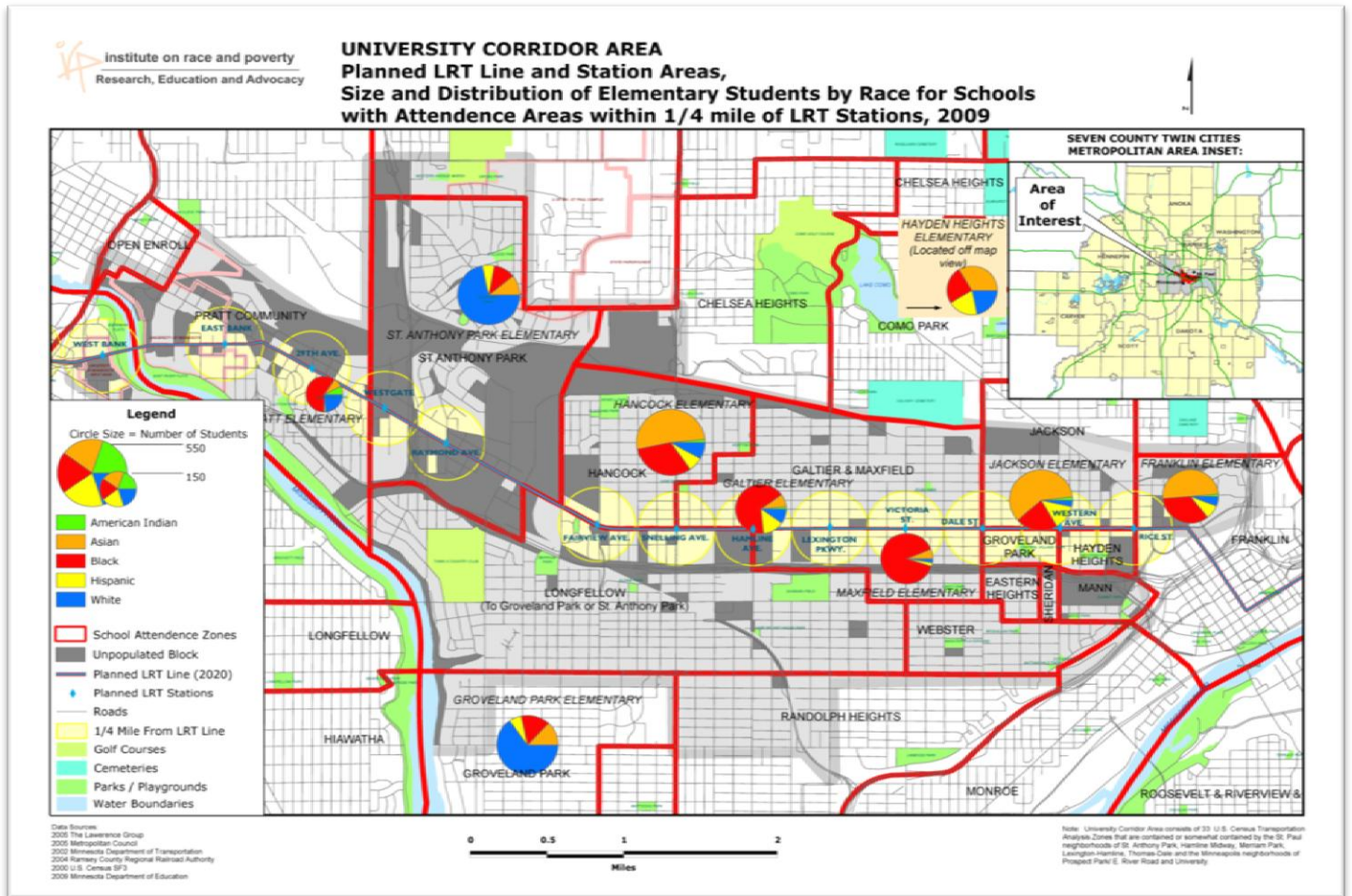


Map 3 shows the saturation of existing government-supported, low-income housing along the Central Corridor. Maps 4 and 5 show that most of the schools on the Central Corridor are both segregated and high-poverty schools.

Map 3

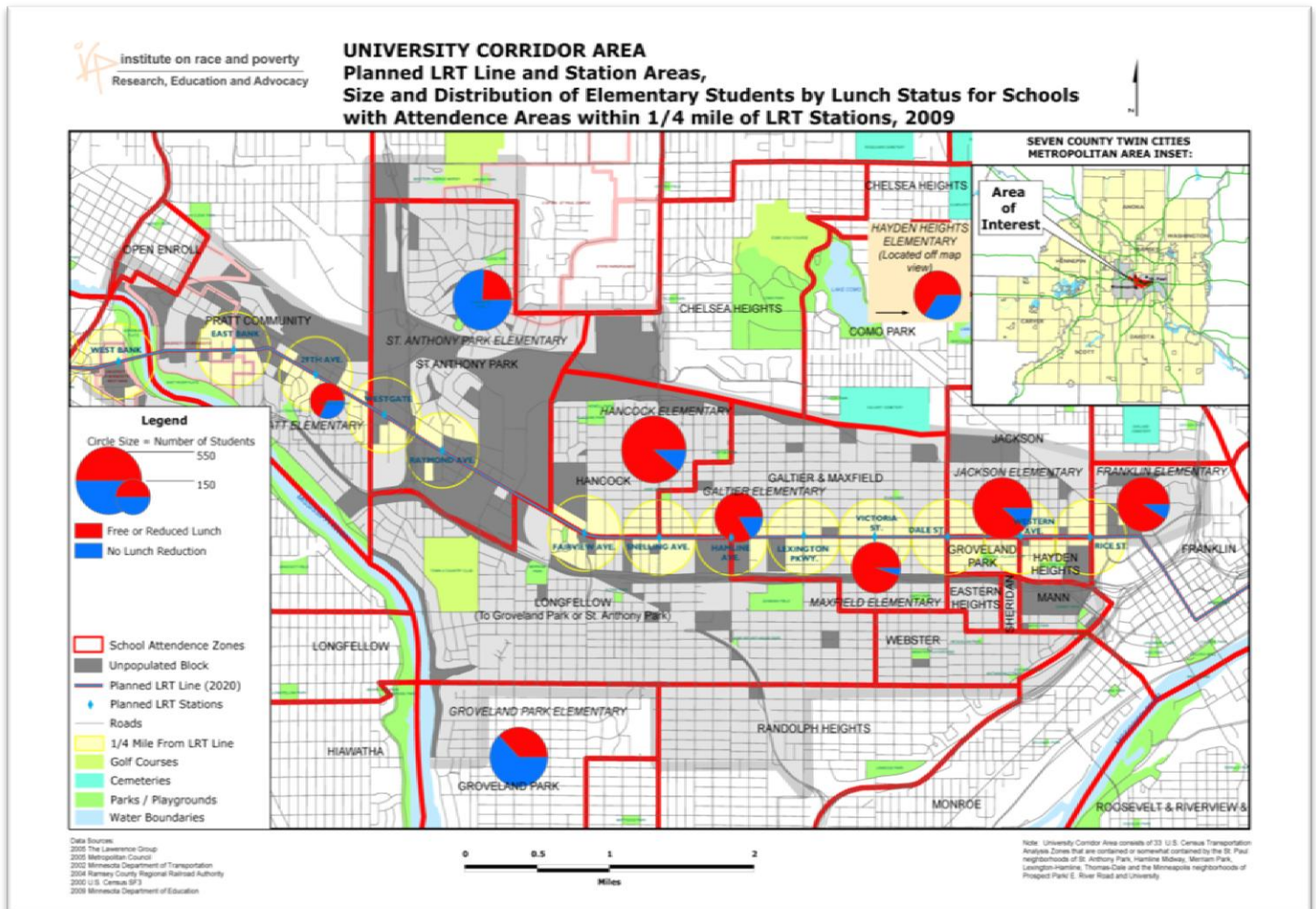


Map 4





Map 5



## 2. Racially integrated magnet schools—proposed by central city school districts, the East Metropolitan Integration District, and the state Commissioner of Education—could ameliorate segregation along the Central Corridor

The Fair Housing Planning Guide declares the importance of racially integrated magnet schools for this type of development.<sup>50</sup> It specifically states: “To encourage a greater racial/ethnic and economic mix of residents in lower-income neighborhoods, jurisdictions might design a strategy that combines a magnet school program with enhanced services and facilities in neighborhoods surrounding magnet schools.”<sup>51</sup>

<sup>50</sup> See HUD, *supra* note 2, § 5.2, 5-9 (Neighborhood Revitalization, Municipal and Other Service, and the Employment-Housing-Transportation Linkage).

<sup>51</sup> See *id.*

One optimal location for a magnet school is the University of Minnesota, located on the west side of the Corridor. More than 50,000 workers commute to the University and the University has already committed to support a magnet school if it were created. A second optimal location is the State Capitol complex on the east side of the Corridor. Together with the St. Paul Central Business District (CBD), the Capitol complex also has a significant commuter base that might be attracted to an appropriately themed, racially integrated magnet school.

There has been support for magnet schools along the Central Corridor from both central city school districts, the East Metropolitan Integration District, and the Commissioner of Education. As yet, magnet schools are not a part of Corridor planning, although the author of this comment has repeatedly raised the possibility and does so now formally.

Regrettably, the AI fails to mention magnet schools as an option for promoting racially integrated, high-performing schools along the Corridor. Absent racially integrated magnet schools, any additional affordable housing on the Corridor will likely only provide access to existing low-performing, racially segregated public schools—the exact opposite of Secretary Donovan’s intent.


The following maps and charts demonstrate that St. Paul’s CBD and the University of Minnesota are two of the largest job centers in the Twin Cities. The maps detail the size and shape of their commuter sheds. The IRP’s *Comprehensive Strategy* argues that these job centers are optimal places for magnet schools and that such magnet schools. Magnet schools along the Central Corridor could provide high-quality, integrated education instead of the segregated, low-quality education now available, and could revitalize the existing housing market along the transit way.<sup>52</sup> The preferences of the commuter shed residents should be surveyed in the process of creating these magnet schools.

It is also noteworthy that the St. Paul public schools are currently moving toward a neighborhood school district plan that is already rapidly increasing the racial segregation in the St. Paul school system that serves the Corridor. Many of the schools on the Corridor’s eastern side of are becoming increasingly isolated and low-performing.

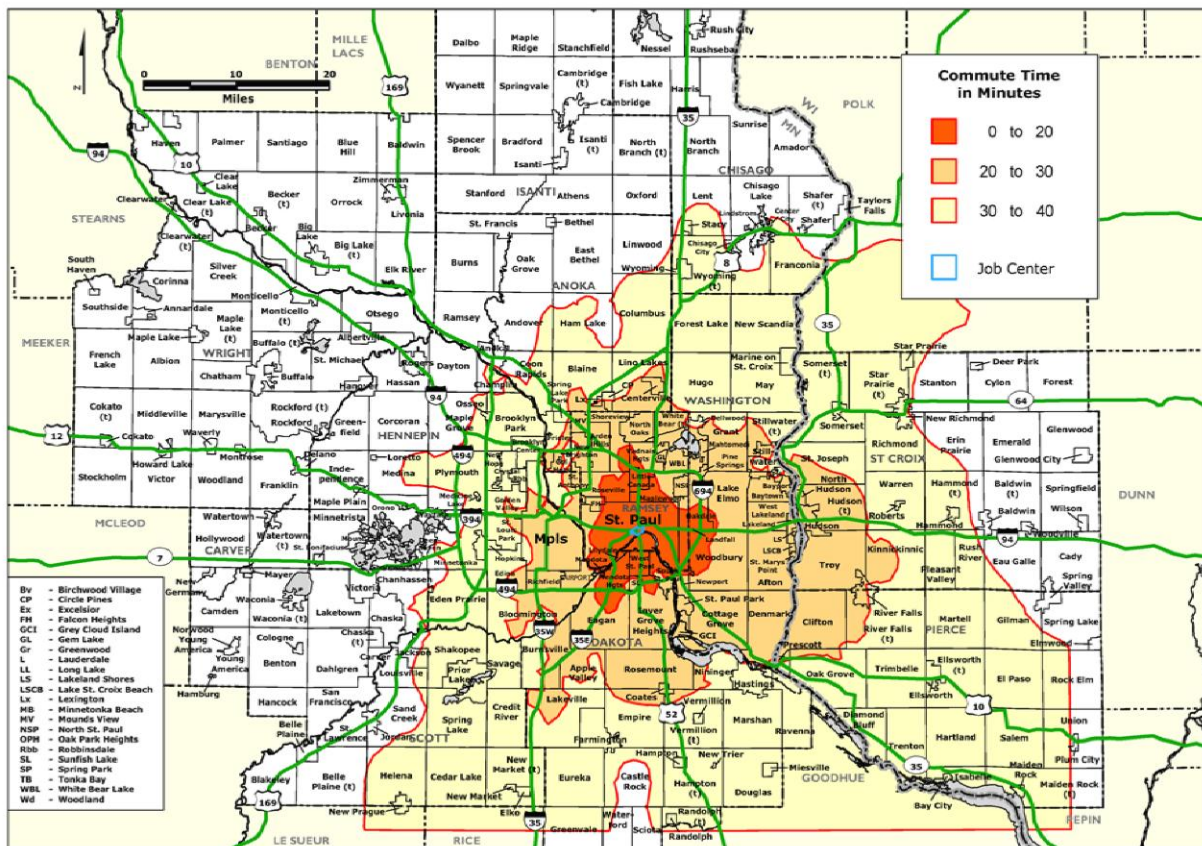
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<sup>52</sup> Institute, *supra* note 12, at 23–25.

Map 6

 **institute on race and poverty**  
Research, Education and Advocacy

**Saint Paul Central Business District Employment Center  
1990 Commuter-Shed**



Data Source: 1990 Census Transportation Planning Package.

Chart 2

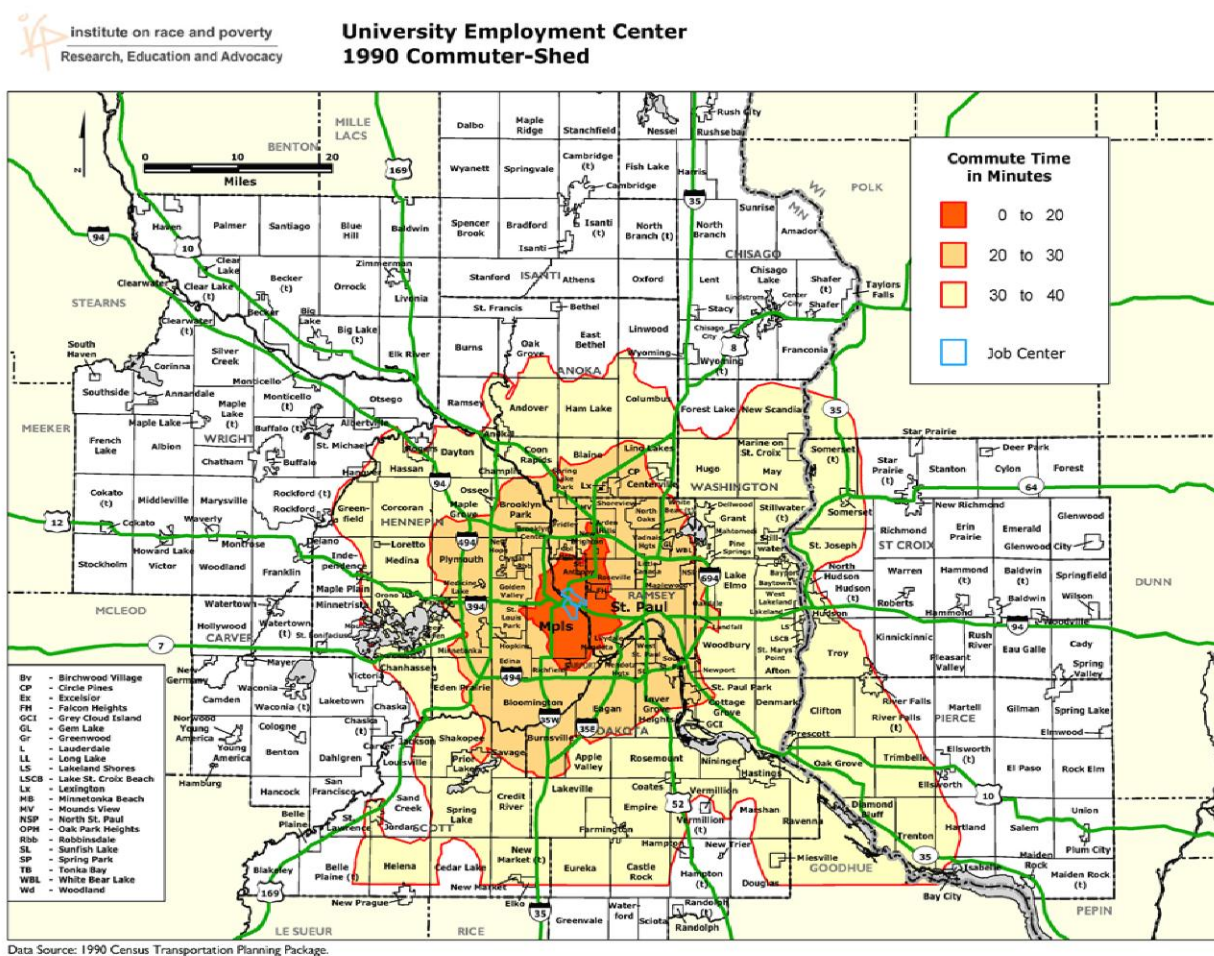
<u>St. Paul Central Business District</u>	<u>2000</u>
Jobs	38,140
Job Growth 1990-2000	-5%
<u>Percentage of Housing Affordable to a Household at 50% or less of the Regional Median Income</u>	
0-20 Minute Commutershed	46%
20-30 Minute Commutershed	31%
30-40 Minute Commutershed	18%
<u>Racial Breakdown</u>	
0-20 Minute Commutershed	
White	68%
Black	10%
Other	22%
20-30 Minute Commutershed	
White	80%
Black	8%
Other	12%
<u>Median Household Income</u>	
0-20 Minute Commutershed	\$52,616
20-30 Minute Commutershed	\$63,718
30-40 Minute Commutershed	\$75,570
<u>Poverty %</u>	
0-20 Minute Commutershed	22%
20-30 Minute Commutershed	8%
30-40 Minute Commutershed	4%

Chart 3

<u>University of Minnesota</u>	<u>2000</u>
Jobs	42,645
Job Growth 1990-2000	-12%
<u>Percentage of Housing Affordable to a Household at 50% or less of the Regional Median Income</u>	
0-20 Minute Commutershed	50%
20-30 Minute Commutershed	30%
30-40 Minute Commutershed	14%
<u>Racial Breakdown</u>	
0-20 Minute Commutershed	
White	66%
Black	14%
Other	20%
20-30 Minute Commutershed	
White	79%
Black	7%
Other	14%
<u>Median Household Income</u>	
0-20 Minute Commutershed	\$50,410
20-30 Minute Commutershed	\$63,309
30-40 Minute Commutershed	\$81,550
<u>Poverty %</u>	
0-20 Minute Commutershed	22%
20-30 Minute Commutershed	8%
30-40 Minute Commutershed	4%



Map 7



**d. The AI does not document the failure of relevant state agencies, including Minnesota Housing, the Met Council, and the State Department of Education, to coordinate racial integration of housing and schools**

In 1994, the Minnesota legislature provided authority to relevant state agencies to coordinate housing and school integration. State and local governments have created three unique city-suburban racial integration districts capable of administering racially integrated schools on a metropolitan level.<sup>53</sup> This effort to coordinate integrated schools and housing was undermined by later developments, including the 1999 desegregation rule<sup>54</sup> and the failure of the Met Council and Minnesota Housing to

<sup>53</sup> Myron Orfield, *Regional Strategies for Racial Integration of Schools and Housing Post-Parents Involved*, 29 LAW & INEQ. 149, 166–67 (2011); Institute, *supra* note 12, at 18.

<sup>54</sup> *Id.* at 1768–72; State of Minn. Dept. of Children, Families, and Learning, Statement of Need and Reasonableness in the Matter of Proposed Rules Relating to Desegregation: Minnesota Rules Chapter 3535 at 3, n.3 (Nov. 1998).

coordinate their efforts with the State Department of Education and the Metropolitan Integration Districts.

Both federal and Minnesota law require (or at the very least authorize) housing and education agencies to coordinate their integration efforts.<sup>55</sup> The Federal Fair Housing Act requires that HUD and public housing authority grantees (such as Minnesota Housing, the Met Council, Minneapolis, St. Paul, and their public housing authorities) consider *the racial composition of neighborhoods and schools* when siting low-income family housing.<sup>56</sup> The Fair Housing Act *mandates* that these entities, together with HUD, use their “immense leverage” to “further integrated and balanced living patterns.”<sup>57</sup> As a part of this obligation, federal law presumptively prohibits building new low-income family housing in racially segregated or unstably integrated neighborhoods.<sup>58</sup> Minnesota law gives the Met Council power to approve or deny local school district siting decisions<sup>59</sup> and the desegregation rule authorization simultaneously requires the Department of Education to “consult with the Metropolitan Council to coordinate school desegregation efforts with the housing, social, economic, and infrastructure needs of the metropolitan area.”<sup>60</sup> The state legislature has also facilitated the creation of three large city-suburban integration school districts to facilitate and coordinate more integrated schools on a metropolitan-wide basis, in consultation with the Met Council.<sup>61</sup>

While the state did not require the agencies to coordinated state housing and school integration efforts, it authorized them to do so. In this context, this failure to act must be interpreted as a failure to affirmatively further fair housing.

**e. The AI fails to note the active state support of a highly fragmented community housing development structure that only builds and promotes the placement of housing in segregated contexts**

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<sup>55</sup> See *infra* notes 102–05.

<sup>56</sup> See 42 U.S.C. § 3608(d) (2010); *Shannon v. United States Dep’t. of Hous. & Urban Dev.*, 436 F.2d 809 (3d Cir. 1970); see also 24 C.F.R. § 941.202 (2010) (requiring public housing sites to be accessible to “*educational, commercial, and health facilities and services*” that are “at least equivalent to those typically found in neighborhoods consisting largely of similar unassisted standard housing” (emphasis added)).

<sup>57</sup> *NAACP v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 156 (1st Cir. 1987) (stating that Title VIII imposes a duty on HUD beyond simply refraining from discrimination).

<sup>58</sup> *Shannon*, 436 F.2d 809; see also 24 C.F.R. § 941.202.

<sup>59</sup> See MINN. STAT. §§ 473.145, 473.175, 473.385 (1975) (The Council has review over the location of public schools and school district capital plans, and can reject school districts plans that are inconsistent with regional goals and objectives.).

<sup>60</sup> MINN. R. 3535; see also 1994 Minn. Laws, Ch. 647, Art. 8, § 2, subd. 1–2 (“the office [of desegregation] shall periodically consult with the metropolitan council to coordinate school desegregation/integration efforts with the housing, social, economic, and infrastructure needs of the metropolitan area. ... [T]he commissioner [of education] may request information or assistance from, or contract with, any state or local agency or officer, local unit of government, or recognized expert to assist the commissioner in performing these activities....”)

<sup>57</sup> For information on the three integration school districts, see <http://sites.google.com/a/wmep.k12.mn.us/wmep-k12-mn-us/> (West Metro Education Program (WMEP)); <http://www.emid6067.net/> (East Metro Integration District (EMID)); [http://www.nws.k12.mn.us/About\\_NWSISD.html](http://www.nws.k12.mn.us/About_NWSISD.html) (Northwest Suburban Integration District (NWSID)).

<sup>61</sup> For information on the three integration school districts, see <http://sites.google.com/a/wmep.k12.mn.us/wmep-k12-mn-us/> (West Metro Education Program (WMEP)); <http://www.emid6067.net/> (East Metro Integration District (EMID)); [http://www.nws.k12.mn.us/About\\_NWSISD.html](http://www.nws.k12.mn.us/About_NWSISD.html) (Northwest Suburban Integration District (NWSID)).

There are strongly vested private, status quo interests among local government agencies and housing producers that have only operated in a segregated context. Because they have no experience working in a pro-integrative context, they fervently resist efforts by the state to move in this direction.

Although many metropolitan areas have growing inequality that particularly hurts low-income residents of color, advocacy by and for low-income residents of color is even more fragmented than local government structures, usually operating at neighborhood scale. Hyper-fragmented advocacy actually makes a region even more fragmented and dysfunctional.

Instead of promoting a regional identity and assisting citizens to define and advocate for regional reforms, these fragmented advocacy organizations do the opposite. They encourage citizens to think in terms of changing one neighborhood, one block, or one school at a time.

Hyper-fragmented advocacy efforts are often portrayed as the less controversial alternative to vital, comprehensive regional reforms. In many cases, these organizations try to preserve their fragile status in fragmented, unequal regions. This often means that their self-interest causes them to oppose the very region-scale reforms needed to expand opportunities for low-income households beyond the segregated areas most often targeted for subsidized housing. Hyper-fragmented advocacy undermines regional reform by monopolizing the conversation, usurping philanthropic resources, and, in the end, failing to bring about substantial change for the communities they represent.

Regionally-focused advocacy groups can overcome this fragmentation by articulating the needs of individual communities and schools *in the context of the regional trends that shape their well-being*. Metropolitan areas need regional advocates to promote the regional reforms that benefit all communities, rather than pitting communities against one another.

Currently, CDC operation is highly localized. CDCs often use strategies that are far narrower in scope than the regional strategies required to revitalize all impacted communities in a metropolitan area. Since they are mainly focused on serving individual areas or municipalities, CDCs destructively compete for funds and conspicuously lack coordination.

In 2006, there were 37 CDCs operating in St. Paul and Minneapolis.<sup>62</sup> Collectively, these organizations raised and spent more than \$83 million on economic development and affordable housing. For example, in 2006, CDCs outspent the \$77.5 million the Met Council spent for the same purpose in 2007. Moreover, all CDCs operating in the region are located in the two central cities, and very few operate in the opportunity-rich suburbs of the region (Map 8).

CDCs struggle to bring in economic development to their neighborhoods mostly because the high-poverty neighborhoods in which they work struggle to compete with developing suburbs. These suburbs attract businesses by offering middle-class customers, discounted land, room for parking and expansion, low taxes, new highways, and relative freedom from crime and environmental problems.<sup>63</sup> Frequently, CDCs lack the organizational capacity to make a significant impact on their neighborhoods, especially when the regional forces that undermine the neighborhoods in the urban core negate their efforts.

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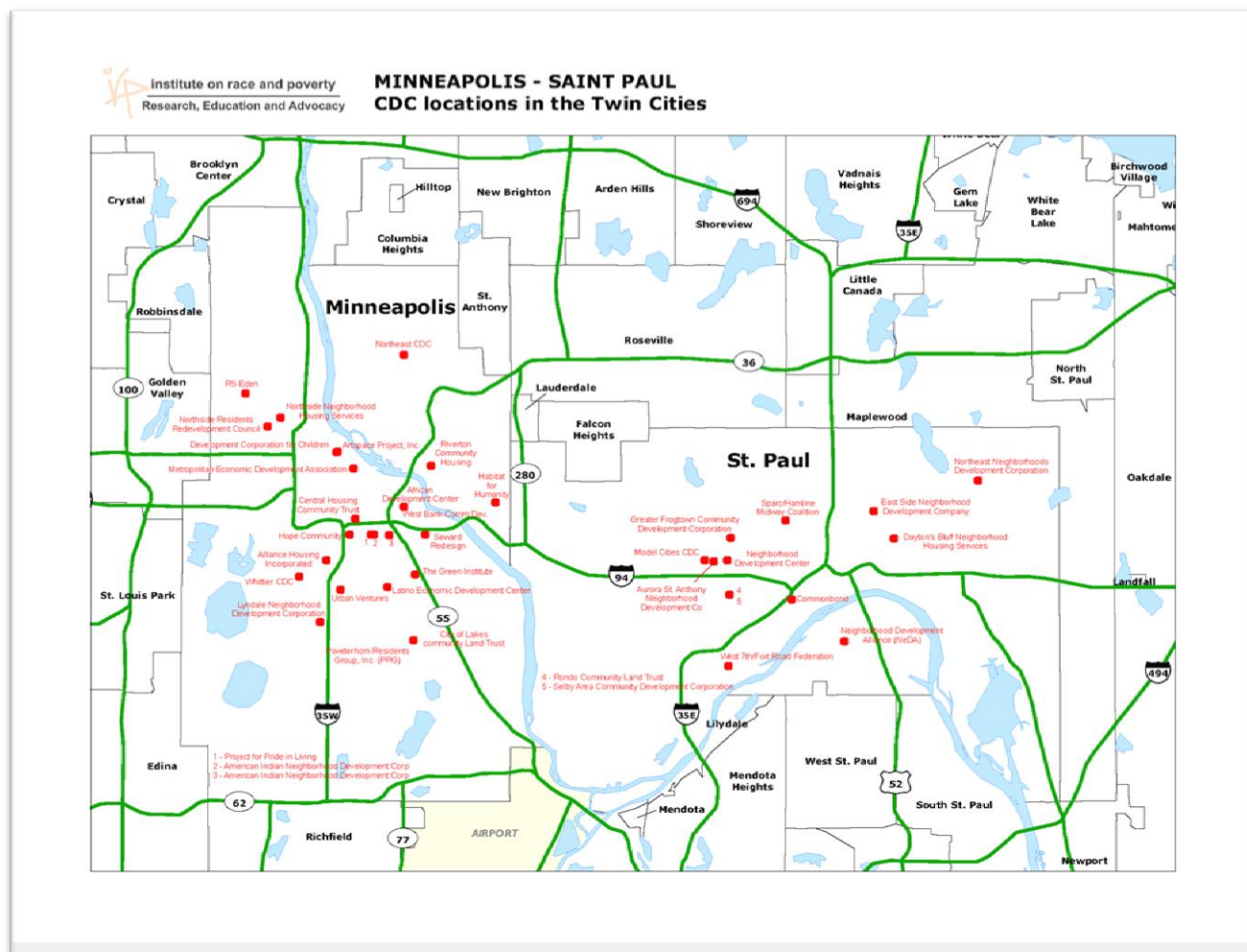
<sup>62</sup>Institute on Race and Poverty, unpublished research. Data available upon request.

<sup>63</sup>ORFIELD, *supra* note 32, at 28.





Map 8



In addition to their ineffectiveness in curbing regional inequalities, CDCs inadvertently contribute to these very same inequalities. Many CDCs work to bring affordable housing into their communities as part of their economic development efforts. However, by concentrating affordable housing in already poor neighborhoods, these CDCs end up locating low-income persons and people of color in areas with relatively few opportunities.

This place-based strategy undermines regional strategies, which aim to enhance opportunity for low-income persons and people of color by placing affordable housing in opportunity-rich suburbs. It also undercuts regional strategies that aim to stabilize urban communities by creating mixed-income housing along transit nodes.

The State, its agencies, and local governments—together with foundations and philanthropic organizations—could expand economic opportunity to low-income communities by promoting and supporting regional CDCs that focus on regional issues. Providing incentives to regional CDCs would advance pro-integrative distributions of affordable housing in the region. Regional CDCs could also

reduce harmful competition and foster collaboration among CDCs to attain comprehensively defined regional goals. When CDCs work together to reach broader regional goals, local planning has a greater likelihood of achieving economic growth and equity. Building the organizational capacity of regional CDCs is an essential strategy to addressing regional inequality.

While most metropolitan areas lack the regional CDCs capable of doing the job, many have regional CDC prototypes. Pro-integrative, race-conscious CDCs are often at the center of successful, pro-integrative housing strategies. For example, at the center of the Montgomery County plan is the Innovative Housing Institute. Making the *Mount Laurel* system work better are Fair Share and Isles. In Chicago, the Leadership Council for Metropolitan Open Communities has been effective. In Dallas, it is the Inclusive Communities Project. In the Twin Cities, Common Bond and Twin Cities Habitat for Humanity have the potential to fill this role.

Regional CDCs could effectively orchestrate and lead a coalition of local CDCs and build much-needed organizational capacity for community groups across the region. They could also educate individual community groups on the benefits of regionalism and provide organizational resources for groups that otherwise lack such resources.

The state should prioritize pro-integrative metropolitan CDCs that have the capacity to coordinate complex finances, lawyers and planners to make exclusionary communities, state and federal agencies, real estate agents, and banks obey the law and be racially fair, and the capacity to build large projects. Alternatively, the state should at least support neighborhood CDCs with explicit pro-integrative goals.

Metropolitan CDCs should interact and support three different types of neighborhood CDCs, each suited for different type of metropolitan neighborhood.

### **1. CDCs in Non-white, segregated high-poverty neighborhoods**

CDCs in non-white, segregated high-poverty neighborhoods should advocate and support stably integrated, racially inclusive magnet schools, substantially improved transit service, higher density mixed-use transit-oriented redevelopment, and significant public reinvestment in every major form of public infrastructure. They should work on improved health care, early childhood education, tutoring for children, and daycare and after school activities. They should do everything consistent with helping these neighborhoods that does not intensify metropolitan segregation. They should build and maintain low-income housing, just not a disproportionate share of the subsidized housing in the metropolitan area.

In Wake County, North Carolina, and Louisville/Jefferson County, Kentucky, high-performing magnet schools located in previously poor, non-white neighborhood are the centerpiece of a metropolitan strategy that has maintained racially integrated schools on a metropolitan basis for four decades. These policies have increased residential integration and decreased resegregation.

### **2. CDCs in racially integrated communities**

Nearly forty percent of the population in America's 50 largest metropolitan areas lives in racially integrated urban and suburban neighborhoods (census tracts with non-white population shares

between 20–60 percent). In America, integrated communities do not remain integrated unless they have community organizations that help them do it.

CDCs in these communities should form the core of stable integration organizations with racially inclusive membership of local officials and important community stakeholders. Integrated communities are often subject to severe racial steering and mortgage lending discrimination. Stable integration CDCs should administer pro-integrative loans or mortgage insurance programs, document claims of housing market discrimination, and establish and operate pro-integrative marketing plans. They should be charge of building and maintaining all the housing that promotes stable integration. CDCs in these neighborhoods should also promote better race relations, more interracial contact communication and understanding in school and neighborhood contexts.

### **3. CDCs in high-opportunity communities**

High-opportunity communities constitute the last third of metropolitan America. These are the communities with the “best” schools, services, health, lowest taxes, and most parks and open space. Here, CDCs should advocate (and, if necessary, litigate) for the reduction of barriers to affordable housing in zoning codes, development agreements, and development practices. They should spearhead efforts to dramatically increase the amount of affordable housing for low-income families. They should develop this housing and ensure it is operated on a non-discriminatory basis.

#### **f. The AI does not note the need to change the public perception of fair housing in the fully developed suburbs**

The largest barrier to fair housing is public perception. Broad sectors of the public—particularly the politically pivotal fully developed suburbs—do not understand the clear benefits of fair housing to their own self-interests. Public education of the fully developed suburbs about fair housing enforcement will strengthen their residential market, increase prime low-cost credit, stabilize their schools, and provide stronger potential for redevelopment. These benefits are not currently well understood within suburban communities.

These communities are presently integrated or on the path to being racially integrated in the next decade. However, as they move through racial transition, they experience steering, loss of prime credit, and rapid racial and economic school changes caused by steering. Fair housing means the white families will continue to be shown housing in these communities, that banks will lend fairly to keep the lifeblood of prime credit flowing to these communities, their schools will remain strong and repopulate naturally, and they will be targets of reinvestment rather than disinvestment. They need fair housing more than any other policy. They do not know this and the state housing agency should provide this necessary education to suburban communities.

#### **IV. Submitted in its present form, the draft AI would amount to a boilerplate or “false” certification to obtain federal funding**

The AI fails to collect and report data required by HUD regarding racial discrimination and racial segregation, or to reference readily available current, relevant local studies on impediments to fair housing choice. It fails to identify the most obvious and significant impediments to fair housing choice, most notably:

- 1) The abandonment of Met Council Policy 13/39, one of the nation’s most effective and pro-integrative regional fair housing systems in favor of an uncoordinated series of racially segregative programs;
- 2) The 1986 state creation of segregative central city sub-allocators of the Low Income Housing Tax Credit (LIHTC), which unnecessarily intensify segregation in housing and schools;
- 3) A state QAP that incents racial segregation by awarding more points to racially segregative projects than racially integrated projects;
- 4) Failure by relevant state agencies, including Minnesota Housing, the Met Council and the State Department of Education, to coordinate racial integration of housing and school as authorized by the legislature in 1994; and
- 5) Active state support of a highly fragmented community housing development structure that only builds and advocates for affordable housing development in segregated neighborhoods. Moreover, the AI fails to outline actions likely to have a substantive impact on reducing impediments to fair housing choice.

For these reasons, if submitted in its present form, the draft AI would amount to a boilerplate or “false” certification to obtain federal funding.<sup>64</sup>

## **V. Recommendations**

### **a. The State must redraft the AI to satisfy to the requirements of the Federal Fair Housing Act**

#### **1. Overview of State Obligation to Affirmatively Further Fair Housing**

Minnesota Housing and all recipients of federal housing funds have obligation under the to “affirmatively further” fair housing,<sup>65</sup> requiring them to use their “immense leverage” to create “integrated and balanced living patterns.”<sup>66</sup> The most direct way for HUD to use this leverage is through a meaningful Analysis of Impediments (AI) framework. Such a framework conditions HUD (and potentially other federal) funding on clear state and local government fair housing plans. Adequate plans have measureable goals for *stable metropolitan racial integration* (SMRI). To date, Minnesota’s AI framework is unacceptably boilerplate, lacking clear standards for SMRI. The first step to strengthen the AI process is to take the existing fair housing framework for SMRI, developed under HUD’s site and neighborhood standards, and make it central to the AI process at all levels. The

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<sup>64</sup> See *United States of America ex rel Anti-Discrimination Center of Metro New York v. Westchester County*, 495 F. Supp. 2d 375 (S.D.N.Y. 2007) and 668 F. Supp. 2d 548 (S.D.N.Y. 2009).

<sup>65</sup> Federal Fair Housing Act, 42 U.S.C. § 3608(d) (2011).

<sup>66</sup> *NAACP v. Sec’y of Hous. and Urban Dev.*, 817 F.2d 149, 156 (1st Cir. 1987) (Breyer, J., holding that Title VIII imposed a duty on HUD beyond simply refraining from discrimination).

state must assure compliance with all allocators. The metrics required to do this are relatively straightforward and the data is readily available at the necessary scales without undue expense or complexity.

## 2. The Existing Federal Fair Housing SMRI Framework

The federal fair housing framework for SMRI is articulated in the site and neighborhood standards developed under the authority of 1) the Federal Fair Housing Act, 2) the Civil Rights Act of 1964, and 3) the Equal Protection Clause of the U.S. Constitution.<sup>67</sup> These site and neighborhood standards are also codified at 24 C.F.R. section 941.202.<sup>68</sup>

For purposes of stable metropolitan racial integration, the Fair Housing Act creates three types of metropolitan neighborhoods or communities:

1) “*Areas of minority concentration*,”<sup>69</sup> or neighborhoods or communities with more than 30 percent non-white population in housing and/or neighborhood schools. These are neighborhoods or communities that are largely non-white and poor, or on a clear path toward racial and social segregation and disinvestment caused by housing discrimination. Under the Fair Housing Act, in areas of minority concentration “color blindness is not permissible” and the “increase of racial concentration is *prima facie* likely to lead to urban blight and is thus *prima facie* at variance with national housing policy.”<sup>70</sup>

2) “*Racially mixed areas*”<sup>71</sup> or neighborhoods or communities that are presently integrated, but where integration is fragile and subject to resegregation. These are neighborhoods or communities with a white and middle income majority, whose racial and economic stability is threatened by illegal and unredressed housing discrimination including, but not limited to, 1) steering by real estate agents, 2) individual and geographic credit discrimination, 3) discriminatory placement of government-sponsored low-income family housing, 4) discriminatory drawing of sub-district school district attendance area boundaries or catchment areas,<sup>72</sup> and 5) other discriminatory housing or education practices by state governments or by surrounding local governments. The Fair Housing Act requires HUD to consider the racial balance of schools attended by government-supported housing recipients.<sup>73</sup> The clear implication of this legal requirement is that stably racially integrated schools are a central component of SMRI enforcement.<sup>74</sup>

3) All other neighborhoods or communities that are predominantly white and middle or upper income and under no threat of resegregation caused by housing discrimination.

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<sup>67</sup> See Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV 1747, 1763–1776 (2005).

<sup>68</sup> See also *Shannon v. United States Dep’t of Hous. and Urban Dev.*, 436 F.2d 809 (3d Cir. 1970); see also 24 C.F.R. § 941.202 (2010) (requiring public housing sites to be accessible to “*educational, commercial, and health facilities and services*” that are “at least equivalent to those typically found in neighborhoods consisting largely of similar unassisted standard housing” (emphasis added)).

<sup>69</sup> 24 C.F.R. § 941.202(c)(1)(i).

<sup>70</sup> *Shannon*, 436 F.2d at 821.

<sup>71</sup> 24 C.F.R. § 941.202(c)(1)(ii).

<sup>72</sup> See *Keyes v. Denver School District*, 413 US 189 (1973) (outlined standards for fair drawing of school catchment areas and declaring that housing and school segregation are reciprocally related).

<sup>73</sup> See 436 F.2d at 822

<sup>74</sup> *Keyes v. Sch. Dist. No. 1, Denver, Colorado*, 413 U.S. 189, 201 (1973) (segregated school boundary drawing and segregated housing patterns have reciprocal effects).

a) *High Opportunity Communities* — A subset of these neighborhoods includes “high opportunity neighborhoods or communities” (HOC). HOCs are defined to include a region’s: 1) best performing and best funded local public schools (which must also be either predominantly white and low poverty or stably racial and economically integrated); 2) best health facilities, services and outcomes; 3) best municipal facilities and services at a given tax rate; 4) highest growth of entry level employment; 5) highest concentration of luxury housing; and 6) strongest, federally guaranteed, low-cost prime credit market for housing and businesses redevelopment.<sup>75</sup> SMRI policy requires that these types of communities be prioritized for the placement of new government-subsidized family housing. Subsequent research not only shows that this approach is necessary for SMRI, but also shows that placement of housing in HOCs provide the best result for advances in educations and employment success.

The preponderance of past and present social science evidence affirms the basic soundness of this approach. Then and now, neighborhoods or communities that are approximately one-third or less non-white tend to be both economically stable and to remain either white or racially integrated for decades without any special intervention. Neighborhoods or communities that are more the 30 percent non-white overwhelmingly tend to be both resegregating and in economic and fiscal decline because of unredressed housing. There are exceptions, most often in neighborhoods or communities using stable integration techniques or in places that are part of powerful countervailing gentrification. However, these exceptions are rare. It is important to note that gentrification as cause of harmful minority displacement is rare and that strengthening urban gentrification, combined with a regional fair share housing approach, is an absolutely essential component of revitalizing distressed city neighborhoods.

The underlying legal and factual process that created the Fair Housing Act’s SMRI remains compelling. The political forces that created the SMRI legal framework—urban riots, the Kerner Commission, a relatively strong pro-integration civil right movement, more supportive courts, Dr. Martin Luther King, Jr.’s assassination, Lyndon Johnson’s presidential leadership, among other factors—are currently present. Hence the preservation of the SMRI framework and a more clear integration of it into the AI process should be a clear objective of the Office of Fair Housing and Equal Opportunity’s agenda.

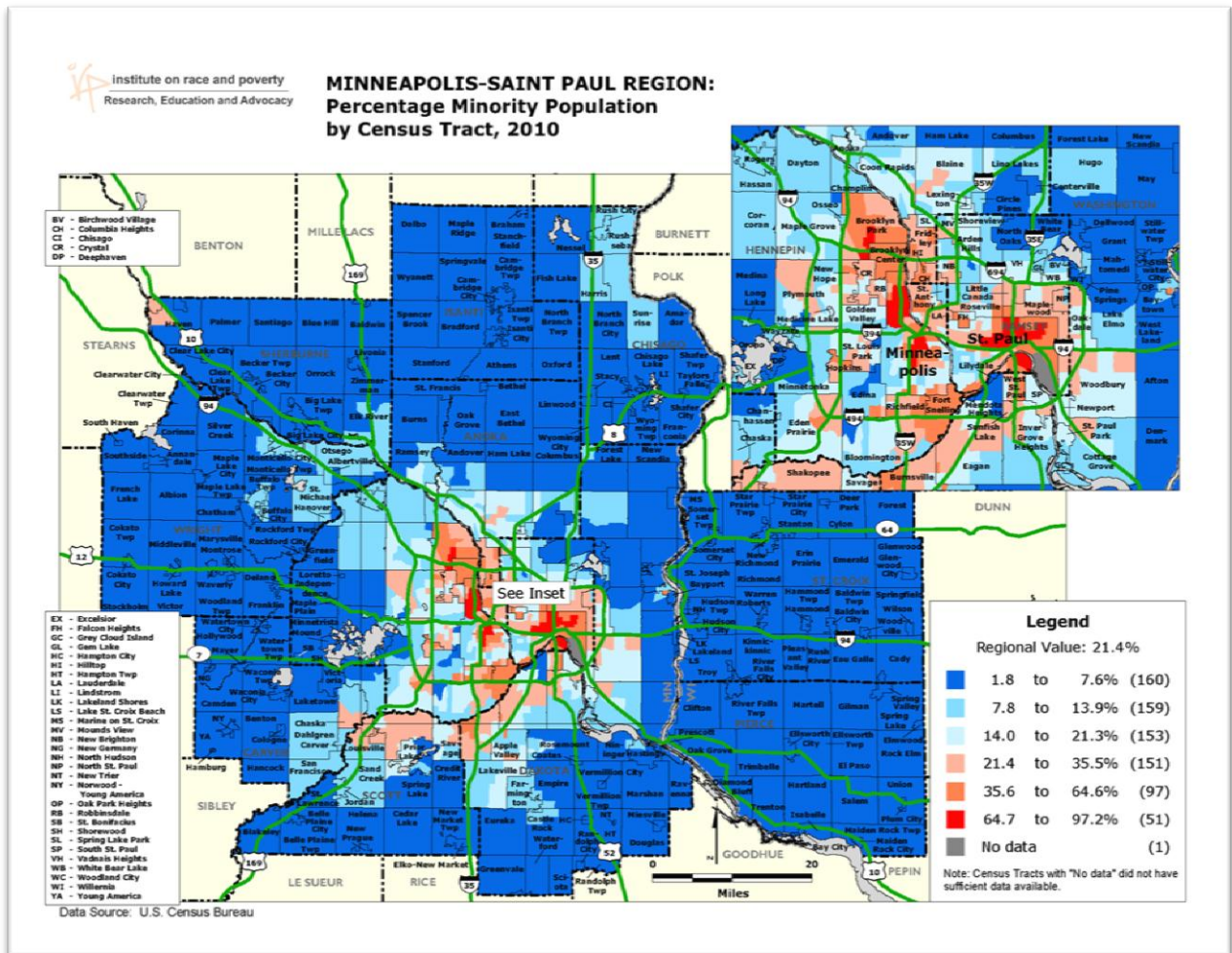
This memo argues the Fair Housing Act’s SMRI framework, as articulated under the site and neighborhood standards, is effective and can be improved in straightforward and elegant ways that can make it easier to understand and enforce. *The SMRI framework is central to an improved AI process.*

Map 9 shows the current distribution of non-white population in the Twin Cities. It illustrates how centralized the region’s non-white segregated and integrated neighborhoods are and how they are spreading into inner suburban areas.

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<sup>75</sup> See 24 C.F.R. § 941.202 (2010) (requiring public housing sites to be accessible to “*educational, commercial, and health facilities and services*” that are “at least equivalent to those typically found in neighborhoods consisting largely of similar unassisted standard housing” (emphasis added)).

Map 9



### 3. Stable Metropolitan Racial Integration and Minnesota's Consolidated Plans and AI.

#### A. Requirement to map SMRI community types

Minnesota's State consolidated plans must map 1) areas of minority concentration, 2) racially mixed areas, and 3) high opportunity communities. The state must in turn require fair housing plans from all covered communities and those fair housing plans must reflect SMRI category types.

#### B. Data and Metrics

The state is required to maintain consolidated plans that monitor trends by collecting data on and mapping (where possible) the characteristics of the SMRI community types: 1) areas of minority concentration, 2) racially mixed areas, and 3) high opportunity communities.

The state must in turn require fair housing plans from all covered communities and the housing plans should monitor characteristics consistent with the SMRI community types. These should include



metrics and data for schools and neighborhoods regarding racial integration, income, student performance, housing characteristics, housing finance, crime, health, local fiscal capacity, jobs, and job growth.

The monitoring should include the following metrics, data, and mapping (where applicable):

- 1) Data and maps showing the distribution of the community types:
  - a. Areas of Minority Concentration – Census tracts with more than 50 percent non-white residents.
  - b. Racially Mixed Areas – Areas with no minority group exceeding 50 percent of the population and a white population of at least 30 percent.
  - c. High Opportunity Communities – Communities with higher-than-average income, jobs per resident in the community or nearby, job growth in the community or nearby, tax base per capita, and stable racial and income mixes.
- 2) Data and maps showing the regional distribution of:
  - a. School data showing the racial mix, economic composition, and test results of all elementary schools and their catchment areas. This data is available from the National Center for Education Statistics and State Departments of Education.
  - b. The placement of subsidized housing under HUD Section 8 and Low Income Housing Tax Credit programs, broken out by the community types.
  - c. Basic health data, including, at a minimum, the incidence of asthma and other income-related diseases.
  - d. Municipal tax base data showing the ability of local governments to finance local public services from the legally available local taxes (which vary from state to state).
  - e. Jobs per capita and job growth, available in most states from the Local Employment Dynamics database.
  - f. Location of luxury housing, defined, for example, as housing valued in the top 20 percentile in the region.
  - g. Credit availability defined for example as areas with the greater than average use of high-quality credit (from Home Mortgage Disclosure Act (HMDA) data).
- 3) Maps showing the framework of stable integration plans in the region and how they relate to information in sections 1 and 2 above.

## **C. AI Requirements Based on SMRI Community Type**

### **i. Category 1 Communities – Areas of Minority Concentration**

In areas of minority concentration, the AI must include a presumption against siting additional low-income family housing in those areas. In this light, housing preservation classifications should not be used to evade this presumption. For example, a preservation expenditure on a low-income family would constitute an additional unit if the cost of preservation were more than one-half of the cost of a

new unit in a high-opportunity community. This presumption could be overcome if the school population in the neighborhood is stably integrated or the neighborhood is served by a stably integrated magnet or charter school.

Category 1 AIs should have targeting objectives to attract middle-income residents, particularly those with school-aged children, and property tax paying businesses to increase local fiscal capacity and services and jobs both for existing residents and to attract new residents.

Such AIs should include:

- a) Plans for the creation or maintenance of stably integrated neighborhoods
- b) Plans for the creation or maintenance of stably integrated public or charter schools that are either neighborhood or cluster-magnet schools. Such schools must meet No Child Left Behind (NCLB) standards and make adequate yearly progress.
- c) Plans to increase local government fiscal capacity by attracting higher-income individuals and property or sales tax paying businesses that create jobs
- d) Plans to improve local public health through medical care, healthy food, and local recreation opportunities
- e) Plans to improve public transit
- f) Plans for basic maintenance of necessary public infrastructure, including streets, sewers, public buildings, parks, etc.
- g) Plans to include the use of federal or state general revenue sharing grants for any purpose consistent with stable racial integration, including targeted property tax incentives to encourage increased fiscal capacity, the creation of new jobs, or reducing local tax rates for improved business and residential climate. HUD and other federal funds should support the implementation of these types of plans.

## **ii. Category 2 Communities – Racially Mixed Communities**

These are communities that are presently racially integrated or on a path to becoming integrated within the next ten years. Generally these are fully developed, relatively dense suburban areas with either a low or declining local fiscal capacity or share of jobs. They are often subject to very severe racial steering and mortgage lending discrimination. The goal of an AI in such communities is to preserve stable racial integration.

AIs for such communities must include fully funded, stable integration plans. These plans must include periodic paired racial testing of both renters and homeowners at a variety of income levels to detect housing discrimination, which would intensify local or metropolitan segregation. Evidence increasingly demonstrates that minority home purchasers are often steered toward racially integrated schools in these suburbs, whereas white families of similar income and qualifications are steered toward whiter schools. Paired testing must include data about the racial composition of local neighborhood schools.

Category 2 AIs must include HMDA data that is frequently and geographically updated to measure disparities between both individuals and communities.

Category 2 AIs must also require and/or encourage stable integration boards with racially inclusive membership of local officials and important community stakeholders. These boards should have the ability to require local real estate and banking entities to cooperate by appearing before them and responding to reasonable requests for data.

Stable integration boards or appropriate local governmental entities should be encouraged to provide pro-integrative loans or mortgage insurance programs, document claims of housing market discrimination, and create and operate pro-integration marketing plans.

AIs in Category 2 communities could include the following policies and community-based strategies to encourage and maintain stably integrated communities:<sup>76</sup>

- Expect government leaders and agencies to proactively promote diverse neighborhoods.
- Encourage consciousness on the part of urban planners “to examine the consequences of their actions . . . that may either destabilize existing neighborhoods or thwart the development of new diverse neighborhoods.”
- Maintain and strengthen fair housing laws.
- Encourage public and private funding and programs that promote mixed-income, racially diverse communities.
- Develop and disseminate information on strategies to strengthen community-based organizations.
- Establish citywide and regional networks of diverse community organizations.
- Develop “[l]eadership training institutes for residents of diverse communities.”
- Maintain quality schools and community safety programs in diverse neighborhoods.
- Encourage the creation of programs that support mixed-income development.
- Encourage local chambers of commerce and other business associations to view diverse communities “as potentially strong markets.”
- Encourage the media to tell “the positive stories of diverse community successes.”
- Encourage “[l]ocal community organizations, existing institutions, and local governments . . . to be receptive to new groups and be willing to work with them on common community issues.”
- Develop programs to create jobs and improve access to jobs in surrounding communities.
- Conduct public discussions about whether “maintaining ethnic- and race-based political constituencies undermines efforts to develop and sustain diverse communities.”

### **iii. Category 3 – High Opportunity Communities**

State AIs should target High Opportunity Communities as priorities for the expenditure of scarce low-income family housing funds and limited enforcement dollars. Moreover, such communities should not receive federal housing funds or other federal funds or state or metropolitan subsidies unless

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<sup>76</sup> For an in-depth discussion of the following policies and strategies, see Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L.J. 877, 929–30 (2006).

they demonstrate that they are taking steps to diversify. AIs for such communities should include:

- a. Reduction of barriers to affordable housing in zoning codes, development agreements, and development practices
- b. Inclusionary housing
- c. **Pledges to take advantage of existing low-income housing tax credits and other funds to meet their metropolitan share of low-income family housing**
- d. Paired testing to ensure that existing family and rental housing is equally available on the basis of race
- e. Pro-integrative mortgage programs

#### **4. Best Practices for Analysis of Impediments to Fair Housing Choice**

My research has identified a few places whose AI effectively considers links between housing location and opportunity. These reports included three important similarities. First, the AIs include racial makeup of public schools in the discussion of impediments to fair housing. Second, the AIs compare actual racial composition by census tract to the projected racial composition of the census tract if no housing discrimination has occurred. Third, the AIs recommend paired testing of rental and real estate agents to determine whether racial steering is occurring in the community. Murfreesboro, Tennessee, and Naperville, Illinois, are two cities that include these important issues in their recent AIs.

##### Racial Makeup of Public Schools

The Murfreesboro and Naperville AIs both include public school data, namely the racial composition of some public schools located in the respective cities. Both AIs note the “pivotal role public schools have in establishing and maintaining stable, racially-integrated communities.”

The AIs also incorporate statistics on racial change in public schools because in previously racially segregated, racially integrated schools, re-segregation is a serious concern. Research shows that changes in school racial composition can foreshadow changes in racial composition of the surrounding community, resulting in a serious impediment to fair housing. The Murfreesboro AI states that “a student body that is ‘minority-majority’ can lead to the neighborhoods the public school serves re-segregating from predominantly white to predominantly African American. This change is brought about by the major role that the racial composition of a public school plays for home seekers in determining the desirability of a neighborhood and city in which to live.” Given increases in minority student populations in some Murfreesboro schools, the AI recommends that the city continue to monitor racial composition of the neighborhoods surrounding those schools to quickly identify shifts in racial composition that may indicate decreased white housing demand.

The Murfreesboro AI also quotes the Murfreesboro Comprehensive Land Use Plan regarding the connection between residential single family developments and public schools: “a consideration in residential zonings will be to provide housing that a ‘neighborhood’ school philosophy can be

maintained. An achievement of social / racial / economic heterogeneous grouping of children in each elementary school zone will be a goal and it will be recognized that residential zoning classifications to some extent serve to meet this goal.”

#### Actual Racial Composition Versus Projected Racial Composition Without Housing Discrimination

The Murfreesboro and Naperville AIs analyze the racial composition in each of the cities’ census tracts and compare the actual racial composition with the projected racial composition expected in a free housing market without housing discrimination (determined solely by household income, and not considering race). These AIs flag those tracts with high racial minority concentrations that were determined to be at a greater risk of future resegregation than expected in a free housing market. The discrepancy between the two figures indicates that housing discrimination is likely creating the discrepancy.

#### Recommended Testing

As stated in the previous section, both the Murfreesboro and Naperville AIs conclude that in some census tracts discrepancies exist between actual racial composition and the racial composition that would be expected in a free housing market. This conclusion leads to the presumption that some type of housing discrimination is occurring. Neither the Murfreesboro nor Naperville AIs include paired testing of rental or real estate agents to determine if illegal racial steering in the housing market is occurring in the respective cities. Both AIs strongly recommend that paired testing would be an effective means of discerning whether racial steering is occurring. Only after identifying instances of racial steering can the community take action to prevent this practice and remove this impediment to fair housing.

- b. The state and its metropolitan-area agencies must return to an effective region-wide fair share housing policy. This policy must more clearly link housing choice and school choice to maximize the integrative impact of housing and school integration programs.**

Regional fair housing policies must reduce school segregation, thereby enhancing educational opportunities for low-income persons and people of color. By promoting housing desegregation, such policies could bring about school desegregation and augment the integrative impact of existing school choice programs. A neighborhood that is racially integrated has a better chance of having schools that are also integrated. Most families of color whose children currently participate in school choice programs tend to travel greater distances to attend higher-quality schools. If these kids were given the first choice to live in affordable housing near those higher-quality schools, the need for student transportation could be significantly reduced.

Thus, linking housing and school choice could facilitate school integration and enhance the educational opportunities of low-income students and students of color. Examples from across the country illustrate that greater housing choice can be an effective strategy for improving opportunities

for low-income persons and people of color when linked with school integration efforts. For instance, Louisville, Kentucky, and Yonkers, New York, have successfully fought school segregation by linking school choice with housing choice. In these places, the respective regional housing agencies made housing vouchers available on a priority basis to children involved in their desegregation programs.<sup>77</sup>

IRP conducted a simulation to demonstrate the potential integration impact of existing housing programs on schools in the Twin Cities metropolitan area. This simulation attempted to quantify the impact of integrative changes to the LIHTC and Section 8 programs in the region. It also examined how a more integrative redistribution of low-income housing in the region would impact students who participate in an existing public school choice program, The Choice is Yours. The results of the simulation show that choice-driven housing programs currently in operation in the Twin Cities metropolitan area have the potential to cut school segregation in half with relatively gradual changes.

IRP has also drafted a plan, in collaboration with the Department of Education, the Metropolitan Integration Districts, and the Association of Metropolitan School Districts, to coordinate housing and school integration which is attached as APPENDIX C with all its recommendation incorporated herewith.

### **c. The State Should Support the Creation of a Regional Fair Housing Center**

Private markets provide most of the housing stock in the United States, and discrimination by private actors play a very significant role in segregating metropolitan areas. Reversing economic and racial segregation requires periodic monitoring of discriminatory practices and vigilant enforcement of fair housing laws. Monitoring and enforcement have been at best sporadic at the federal level and non-existent at the state or regional level.

In the absence of sustained federal or state commitment to fair housing, the Twin Cities region needs state-led efforts to enforce fair housing in the region. For instance, one effective mechanism for enforcing fair housing would be a state-funded Regional Fair Housing Center that periodically conducts controlled tests to monitor discrimination by real estate agents, financial institutions, and mortgage and insurance brokers.

### **d. Conclusion**

The State of Minnesota has obligations to comply with the Fair Housing Act, and its state agencies with fair housing obligations must coordinate their activities to fulfill their joint fair housing obligations in a manner that collectively affirmatively furthers fair housing. In terms of compliance with federal law, the Supreme Court has held “the powers of several state officers must be treated as merged into a single officer.”<sup>78</sup> This is particularly true in the case of racial discrimination fostered by the cumulative acts of separate state entities, whether discrimination is accomplished “ingeniously or ingenuously.”<sup>79</sup>

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<sup>77</sup> See John Powell, *Segregation and Educational Inadequacy in Twin Cities Public Schools*, 17 HAMLINE J. PUB. L. & POL’Y 337, 360 (1996).

<sup>78</sup> See *Iowa-Des Moines Nat’l Bank v. Bennett*, 284 U.S. 239, 245 (1931).

<sup>79</sup> See *Smith v. Texas*, 311 U.S. 128, 132 (1940); see also *Spencer v. Kugler*, 404 U.S. 1027 (1972) (Douglas, J., dissenting); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, (1971).

The state's comprehensive housing plan and AI represent a *colorblind* approach to affordable housing policy. If this were a single-race state without stunning racial segregation and blatant and continuing housing discrimination, this might be acceptable. However, racial discrimination in housing markets is a more fundamental factor determining individual opportunity and neighborhood revitalization than any policy of mere bricks and mortar. Non-white, racially segregated neighborhoods, with few exceptions, have long continued unabated economic and educational decline for forty years. They have not only been starved of private capital, but recently have also been subjected to a saturated pattern of racially discriminatory predatory lending practices. Regrettably, today these neighborhoods have relatively poorer schools, higher unemployment, and more incarceration than ever.

A colorblind policy like Minnesota's—in which most family affordable housing is built in segregated or resegregating low-opportunity neighborhoods—means that, given the background reality of multi-level discrimination, the problems of segregation and the associated harms will continue and affordable housing policy will itself reinforce inequality and urban disinvestment that has characterized American cities.

Furthermore, the colorblind approach is technically illegal. The Fair Housing Act commands that our housing policy be *race-conscious and pro-integrative* on a metropolitan level. In this context, the federal courts have declared that a colorblind housing policy is “impermissible.” This (unenforced) law requires the federal government and all entities receiving federal housing support to use whatever “leverage” they have to foster racially integrated schools and communities. Federal law creates a presumption that building new units in segregated areas with failing schools is a racially discriminatory practice, particularly when it is possible to build these units in higher opportunity white areas.

There is a near perfect correlation between minority and economic segregation in schools and academic failure. Segregated high schools are “drop out factories” that are much more connected to prison than college. This is true whether they are public or charter schools, whether they are in states where the central city schools are broke or where they spend much more than the suburban average in segregated schools. Separate but equal—and even separate and more money than the suburbs—has never worked. Similarly, high-intensity approaches like Geoffrey Canada's efforts in Harlem are very hard to reproduce and unsustainable in most contexts. These approaches are more anecdote than viable as systematic policy.

In contrast, the benefits of racially and socially integrated schools have been documented in innumerable studies over decades and include improved academic achievement by minority students; enhanced critical thinking skills for all students; better graduation rates, higher future incomes, higher college attendance rates and greater access to social networks associated with opportunity for minority students; and better interracial relations in future living and employment environments for students of all races. Integration is not a one-step panacea, but it is a *necessary* part of any real effort to improve education.

There is and should be a strong preference for siting new family units in areas with the best schools and against placing new units in areas that only have failing schools. While the federal government and state governments can and should build part of its housing in segregated areas, its overall balance sheet must be pro-integrative on a metropolitan basis. The laws and facts require state

agencies to take into account the racial and economic composition of schools and their performance before they make siting decisions for new low-income family housing.



## Appendix VI: IMO Comments on State of Minnesota Qualified Allocation Plan



February 20, 2012

Minnesota Housing Finance Agency  
Multifamily Underwriting  
Housing Tax Credit Program  
400 Sibley Street, Suite 300  
St. Paul, MN 55101-4451

Re: Orfield Comments on State Qualified Allocation Plan.

To Whom It May Concern:

The Minnesota Housing Finance Agency (MHFA) has a duty to “affirmatively further fair housing.”<sup>1</sup> This affirmative duty is “more than an obligation not to discriminate,” it is an obligation for MHFA to use its “immense leverage” to further “integrated and balanced living patterns.”<sup>2</sup> Minnesota’s proposed Qualified Allocation Plan (QAP) does just the opposite. It encourages racial segregation by encouraging the placement of projects in segregated or unstably integrated areas and discouraging projects in high opportunity white or stably integrated areas. The QAP must be amended to conform to the requirements of the Fair Housing Act and strongly encourage the location of the majority of units in pro-integrative locations. Between, 2005-2011, the QAP resulted in the building of 1,200 units in the central cities, areas with segregated, low performing elementary schools. At the same time the state rejected \$32,000,000 worth of projects in the suburbs where schools are more likely to be low poverty, high performing schools. Moreover, these suburban projects may actually have been less expensive to build with lower rents than the new projects built in the segregated neighborhoods of the central cities.

MFHA is not just a disinterested banker. It must comply with the Tax Credit statute *and the Fair Housing Act*.<sup>3</sup> To the extent that the State has opted to have a single entity administer both the LIHTC and CDBG/HOME block grant programs, its obligations to affirmatively further fair housing come into play with even greater legal force.<sup>4</sup> The State may be exceptionally

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<sup>1</sup> 42 U.S.C. §3608 (d).

<sup>2</sup> NAACP v. Sec’y of Hous. & Urban Dev., 817 F.2d 149,156 (1<sup>st</sup> Cir. 1987). (citing NAACP v. Harris, 567 F. Supp. 637, 644 (D. Mass. 1983)).

<sup>3</sup> See Inclusive Communities Project v. Texas Dep’t of Housing and Community Affairs, 749 F.Supp. 2d 486 (N.D. Texas 2010).

<sup>4</sup> The certification that the State of Minnesota signs, as a precondition of receiving roughly \$30 million/year in Community Development Block Grants and other funds says that the State is promising HUD that all of its programs (not just those supported by CDBG and other funds, but the entire housing and community development function) will be operated consistent with affirmatively further fair housing (AFFH) requirements. *See Fair Housing Planning Guide*, vol.1, 1-3 (1993) *available at* <http://www.hud.gov/offices/fheo/images/fhpg.pdf>. Although a grantee’s AFFH obligation arises in connection with the receipt of federal funding, its AFFH obligation is not restricted to the design and operation of HUD-funded programs at the state or local level. The AFFH obligation extends to all housing and housing-related activities in the grantee’s jurisdictional area whether publicly or privately funded. The Guide echoes the Civil Rights Restoration Act of 1988 (CRRRA), which overruled the Supreme Court’s

efficient at producing affordable housing units—whether with LIHTC or otherwise—but the focus on the State as “banker only” and on raw numbers of units ignores one of the most important requirements Judge Cote underscored in her Westchester summary judgment opinion:

The HUD Guide explains that while it is often the case that minorities are disproportionately represented among the low-income population, simply providing affordable housing for the low-income population “is not in and of itself sufficient to affirmatively further fair housing.” This unsurprising statement is grounded in the statutory and regulatory framework behind the obligation to AFFH, which as already discussed, is concerned with addressing whether there are independent barriers to protected classes exercising fair housing choice. As a matter of logic, providing more affordable housing for a low-income racial minority will improve its housing stock but may do little to change any pattern of discrimination or segregation. Addressing that pattern would at a minimum necessitate an analysis of where the additional housing is placed.<sup>5</sup>

The Fair Housing Act forbids building a disproportionate share of low-income housing in poor and segregated, or integrated but resegregating, neighborhoods, when it is possible to build that same housing in low-poverty, high-opportunity white or stably integrated neighborhoods. Under the Fair Housing Act “color blindness is not permissible” in the decision to add low-income housing units to poor segregated neighborhoods or unstably integrated neighborhoods.<sup>6</sup> Courts in these circumstance have held that the “increase ... of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy.”<sup>7</sup> Moreover the courts have made abundantly clear that “increasing or maintaining racially segregated housing patterns merely because minority groups will gain an immediate benefit would render such persons willing, and perhaps unwitting, partners in the trend toward ghettoization of our urban centers.”<sup>8</sup>

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Grove City case, and re-established the principle that recipients of federal funds must comply with civil rights laws in all areas, not just in the particular program or activity that received federal funding. See, e.g. *Congress Overrides the President’s Veto of the Civil Rights Restoration Act*, The Civil Rights Monitor, vol. 1, no.1 (Mar 1988), available at <http://www.civilrights.org/monitor/march1988/art1p1.html>. Since the language of the AFFH provision of the Fair Housing Act (42 USC §3608, and implementing regulations at 24 CFR Parts 91 and 570) are structurally similar to the civil rights statutes involved in the CRRA the principle is the same: Congress exercised its power under the Spending Clause to say, effectively: “If you take this federal money, then the entire housing and community development function of the state/municipality will be governed by these civil rights principles.” If that is the case, then the State has an obligation to govern its own state programs in a manner that complies with AFFH. That includes the LIHTC program, whether operated by the state or legislatively delegated to sub-allocators. The obligation to run an AFFH-compliant program cannot be avoided by handing it off to another agency. The State will have obligations to monitor the entities to whom functions are delegated, and will retain respondent superior liability on top of the statutory, regulatory and contractual AFFH obligations.

<sup>5</sup> See *United States of America ex rel Anti-Discrimination Center of Metro New York v. Westchester County*, 668 F. Supp. 2d 548, 564-65 (S.D.N.Y. 2009).

<sup>6</sup> *Shannon v. United States Dep’t. of Hous. & Urban Dev.*, 436 F.2d 809, 820 (3d Cir. 1970) (finding that “increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy” and therefore concluding that housing authorities should not site new housing in racially concentrated areas if there are viable alternatives); see also 24 C.F.R. § 941.202 (g) (2010) (requiring public housing sites to be accessible to “educational, commercial, and health facilities and services” that are “at least equivalent to those typically found in neighborhoods consisting largely of similar unassisted standard housing” (emphasis added)).

<sup>7</sup> 436 F.2d at 821; 24 C.F.R. § 941.202.

<sup>8</sup> *Otero v. New York Hous. Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973).

The Fair Housing Act requires Minnesota Housing and all of the state sub-allocators to consider the racial balance of schools attended by government-supported housing recipients<sup>9</sup> The clear implication of this legal requirement is that stably racially integrated schools are a central component of fair housing policy. Similarly, the Supreme Court has repeatedly held that school and housing segregation are reciprocally related and the patterns of illegal housing segregation causes school segregation and, similarly, that illegal school segregation causes segregation in housing.<sup>10</sup>

Moreover, HUD's Fair Housing Equity Assessment Grant Applications require grant recipients, such as the Met Council's Corridors of Opportunity Program, not merely to monitor the racial balance of local schools but their academic performance as well.<sup>11</sup>

On February 23, 2010, Secretary Shaun Donovan clarified HUD's Fair Housing requirements for its state grantees before Congress, stating:

[S]ustainability also means creating "geographies of opportunity," places that effectively connect people to jobs, **quality public schools**, and other amenities. Today, too many HUD-assisted families are stuck in neighborhoods of concentrated poverty and segregation, where one's zip code **predicts poor educational**, employment, and even health outcomes. These neighborhoods are not sustainable in their present state.<sup>12</sup>

Contrary to law, the proposed QAP is not only impermissibly colorblind but goes beyond to create a system of scoring that encourages the placement of housing projects in areas of minority concentration near deeply racially segregated and low-performing schools, or in unstably integrated areas. This system of point scoring ignores Minnesota Housing's clear obligations to affirmatively further fair housing and to use its leverage to create balanced and integrated housing. Indeed, data described below indicate that, despite clear fair housing obligations, the state's fair share law, and a record of pro-integrative location decisions in earlier years, only 17 percent of subsidized units since 1986 are now located in a pro-integrative manner. Eighty-three percent of units are located in ways that now contribute to segregation or resegregation. This outcome is particularly suspect in contrast to MHFA's pro-integrative siting of affordable housing in the period from 1970 to 1986.

The need for more pro-integrative siting incentives in the Twin Cities is clear. According to Minnesota Department of Education data, the number of elementary schools in the region with very high non-white student percentages (above 80 percent) went from 11 schools in 1995 to 55 in 2002. Since 2002, this number has increased still further to 83 schools. Put another way, the number of non-white students in highly segregated schools increased dramatically from just

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<sup>9</sup> Shannon v. United States Dep't of Hous. and Urban Dev., 436 F.2d 809, 822 (3d Cir. 1970); 24 C.F.R. § 941.202 (c)(2)(g); The Fair Housing Acts requires that HUD must consider 1) the racial balance of schools attended by government supported housing recipients, 2) the location of middle income and luxury housing, and 3) the availability of federally guaranteed low cost loans.

<sup>10</sup> See, e.g. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20-21 (1971); Keyes v. Sch. Dist. No. 1, Denver, Colorado, 413 U.S. 189, 202-203 (1973); Milliken v. Bradley, 418 U.S. 717, 755 (1974).

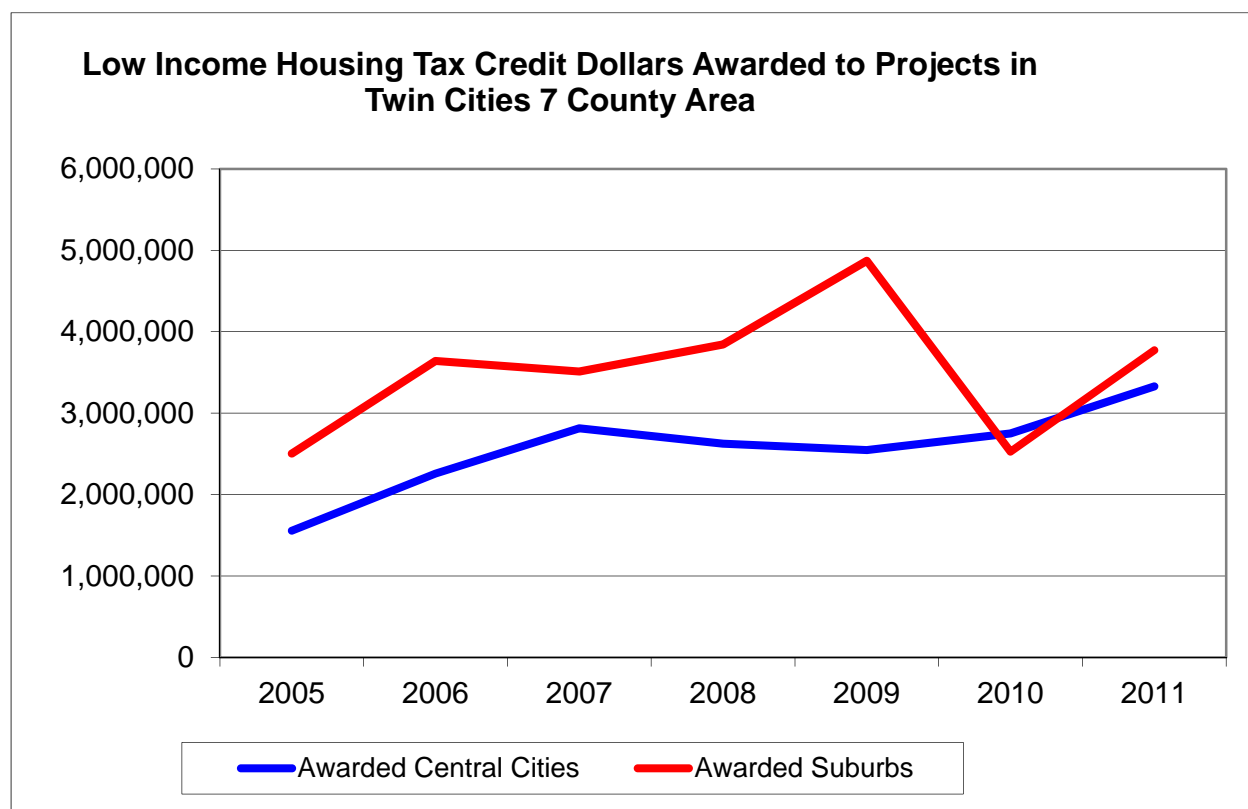
<sup>11</sup> See Addressing Equity and Opportunity: The Regional Fair Housing and Equity Assessment (FHEA) Grant Obligation (August 2011), [http://www.prrac.org/pdf/Regional\\_FH\\_Equity\\_Assessment\\_HUD\\_Aug\\_2011.pdf](http://www.prrac.org/pdf/Regional_FH_Equity_Assessment_HUD_Aug_2011.pdf).

<sup>12</sup> Press Release, HUD, Written Testimony of Shaun Donovan: FY2011 Budget Request for HUD (Feb. 23, 2010) (emphasis added), available at <http://portal.hud.gov/hudportal/HUD?src=/press/testimonies/2010/2010-02-23>.

3,419 in 1995 (or 8 percent of all students of color in the region) to 20,074 in 2002 (32 percent) and 31,535 in 2010 (36 percent).

### Recent trends in the LIHTC Program

Recent research by the Institute on Race and Poverty (IRP), reported in *Region: Planning the Future of the Twin Cities* showed that, in 2002, roughly 50 percent of LIHTC units and 55 percent Section 8 project units were located in the region's two central cities.<sup>13</sup> IRP analysis of more recent tax credit allocation data in MHFA's annual publication of "Housing Tax Credit Awards and Applicants" shows that the percentage of LIHTC awards going to suburbs, measured in dollars, hovered near 60 percent from 2005 to 2009, then dropping to 50 percent in 2010 and 2011 (reflected in the chart below). Thus the central cities with only a quarter of the region's population and deeply racially segregated schools have received roughly 50 percent of the tax credit units and recent tax credit funding.

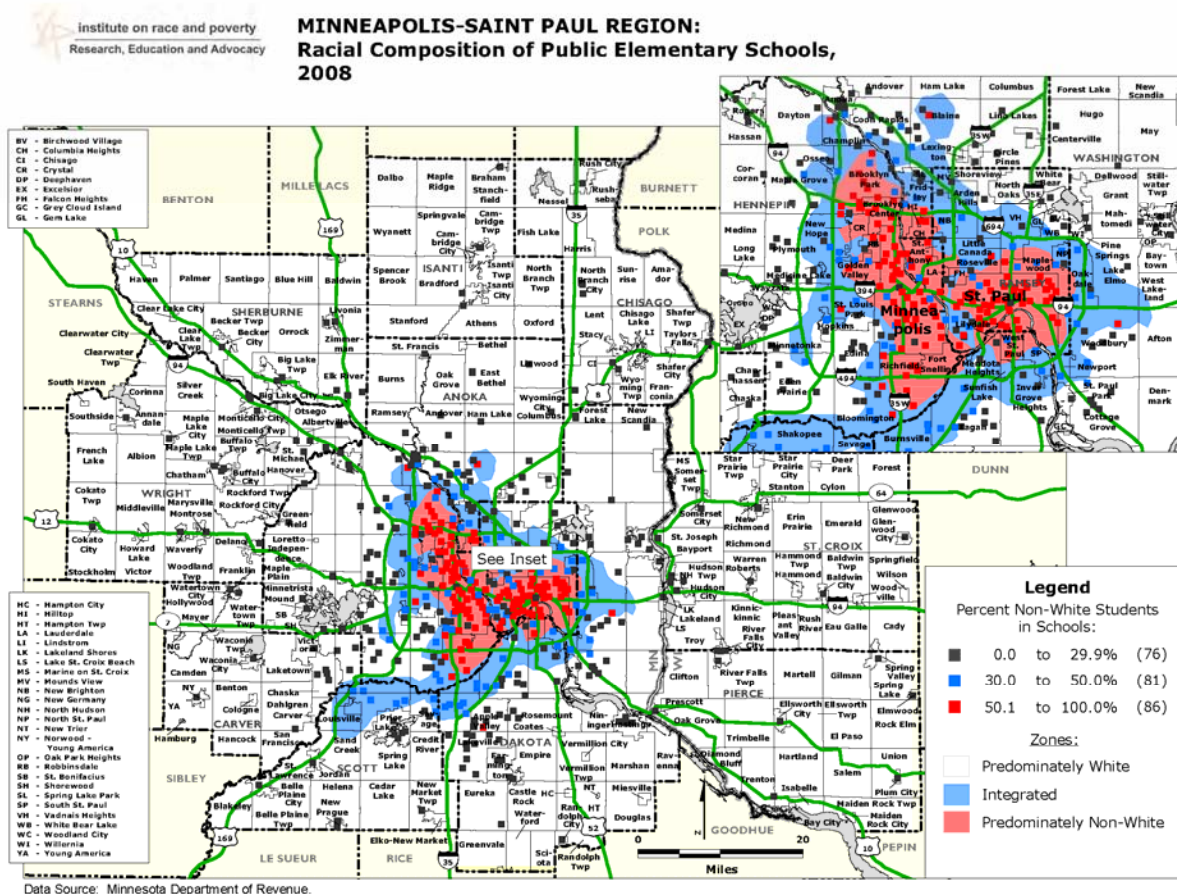


Moreover subsidized housing units in the suburbs since 1986 continue to be located primarily in areas with schools which are predominantly non-white or resegregating. The map below shows the location of elementary schools in the region, divided into three categories—predominantly white (schools with non-white shares between 0 and 30 percent), integrated (non-white shares between 30 and 50 percent), and predominantly non-white (non-white shares

<sup>13</sup> Orfield, Myron and Thomas Luce, *Region: Planning the Future of the Twin Cities*, University of Minnesota Press, 2010, Chapter 3.

greater than 50 percent). The map also shows contours for the parts of the region where schools of each sort predominate. In 2007, nearly two-thirds (64 percent) of all subsidized housing units in the region were inside the red contour where nearly all schools were predominantly non-white. Only 17 percent were in the non-shaded area where schools were predominantly white. This part of the region, of course, is where opportunity structures are strongest—where jobs are growing most quickly and where low-poverty, high quality schools predominate.

This pattern is very similar to neighborhood characteristics (as opposed to schools). Despite multiple levels of law and regulation to the contrary, subsidized units are also still disproportionately in neighborhoods of minority concentration (as defined by HUD) in the Twin Cities. IRP analysis of Housing Link data shows that in 2007, 57 percent of subsidized units (including LIHTC and Section 8 project units) were in census tracts with more than 30 percent minority residents, more than twice the percentage of the region's population living in those tracts.



A simulation by IRP of the potential effects of the placement of subsidized units in 2005 showed that more proactive placement of existing LIHTC units in attendance areas for low poverty schools could have significantly increased school integration at that time.<sup>14</sup> For instance,

<sup>14</sup> See Institute on Race and Poverty, *A Comprehensive Strategy to Integrate Twin Cities Schools and Neighborhoods*, 38, available at <http://www.irpumn.org>.

if LIHTC and project-based Section 8 units had been assigned *randomly* by race and located across the region in the same proportions as overall population, then the region could have been brought nearly one-third of the way to the goal of integrated schools in 2005.<sup>15</sup> It is thus conceivable that pro-integrative placement of new units in low poverty school attendance areas could do most of the work necessary for a racially integrated regional school system.<sup>16</sup> Indeed, in the long run, if housing policy returns to the more pro-integrative strategies of earlier decades it may be possible to have integrated schools with less pro-integrative busing than exists today.

Overall, as the central city schools have collapsed under segregation and poverty, the central cities have been allocated nearly twice their regional fair share of tax credit funding. Most of the tax credit units have been placed in neighborhoods in which the schools are predominately poor and non-white, have failing test scores (whether public or charter) and are growing worse and more isolated from college and middle-income jobs.

Recent MHFA tax credit allocation data also show that between 2005 and 2011, \$10 million of new construction added about 1,200 of new units in the central cities, often in segregated neighborhoods, while at the same time, the state rejected about \$32 million worth of requests from suburban areas, the part of the region more likely to have higher achieving and more integrated schools. In the suburbs, 85 percent of these LIHTC units are in white or stably integrated area. In the city, 85 percent of the units are in neighborhoods with more than 30 percent minority households and virtually all of the units are in areas with mostly non-white, high poverty and low performing schools. (See the table below and the map on the following page.)

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<sup>15</sup> *Id.* at 39.

<sup>16</sup> If a random placement of units does half the work, a pro-integrative placement of all of the units by logical deduction could do even more.

**Number of HTC and Affordable Rental Units  
by Percentage Minority in Census Tracts  
in the Cities of Minneapolis and Saint Paul, 2005-2011**

% Minority in Tract	HTC Units	Rental Units Affordable at % of Regional Income		
		30%	50%	80%
0 to 19%	73	1,246	13,396	23,903
20 to 29%	263	2,135	9,963	16,023
30 to 49%	426	6,123	18,077	28,615
50 to 59%	200	2,915	8,823	12,693
60 to 79%	545	5,840	16,742	23,743
80% or more	329	3,628	6,779	9,690
Total	1,836	21,889	73,780	114,668

**Number of HTC and Affordable Rental Units  
by Percentage Minority in Census Tracts  
in the Twin Cities Suburbs, 2005-2011**

% Minority in Tract	HTC Units	Rental Units Affordable at % of Regional Income		
		30%	50%	80%
0 to 19%	1,127	6,954	26,301	60,473
20 to 29%	507	4,874	23,254	51,749
30 to 49%	282	1,905	12,398	25,412
50 to 59%	22	754	3,854	5,919
60 to 79%	0	295	3,029	4,174
80% or more	0	61	640	1,170
Total	1,938	14,843	69,476	148,897

**Share of HTC and Affordable Rental Units  
by Percentage Minority in Census Tracts  
in the Cities of Minneapolis and Saint Paul, 2005-2011**

% Minority in Tract	HTC Units	Rental Units Affordable at % of Regional Income		
		30%	50%	80%
0 to 19%	4.0	5.7	18.2	20.8
20 to 29%	14.3	9.8	13.5	14.0
30 to 49%	23.2	28.0	24.5	25.0
50 to 59%	10.9	13.3	12.0	11.1
60 to 79%	29.7	26.7	22.7	20.7
80% or more	17.9	16.6	9.2	8.5
Total	100.0	100.0	100.0	100.0

**Share of HTC and Affordable Rental Units  
by Percentage Minority in Census Tracts  
in the Twin Cities Suburbs, 2005-2011**

% Minority in Tract	HTC Units	Rental Units Affordable at % of Regional Income		
		30%	50%	80%
0 to 19%	58.2	46.9	37.9	40.6
20 to 29%	26.2	32.8	33.5	34.8
30 to 49%	14.6	12.8	17.8	17.1
50 to 59%	1.1	5.1	5.5	4.0
60 to 79%	0.0	2.0	4.4	2.8
80% or more	0.0	0.4	0.9	0.8
Total	100.0	100.0	100.0	100.0

Source: 2005-2011 Minnesota Housing Finance Agency, 2006-2010 American Community Survey

Source: 2005-2011 Minnesota Housing Finance Agency, 2006-2010 American Community Survey

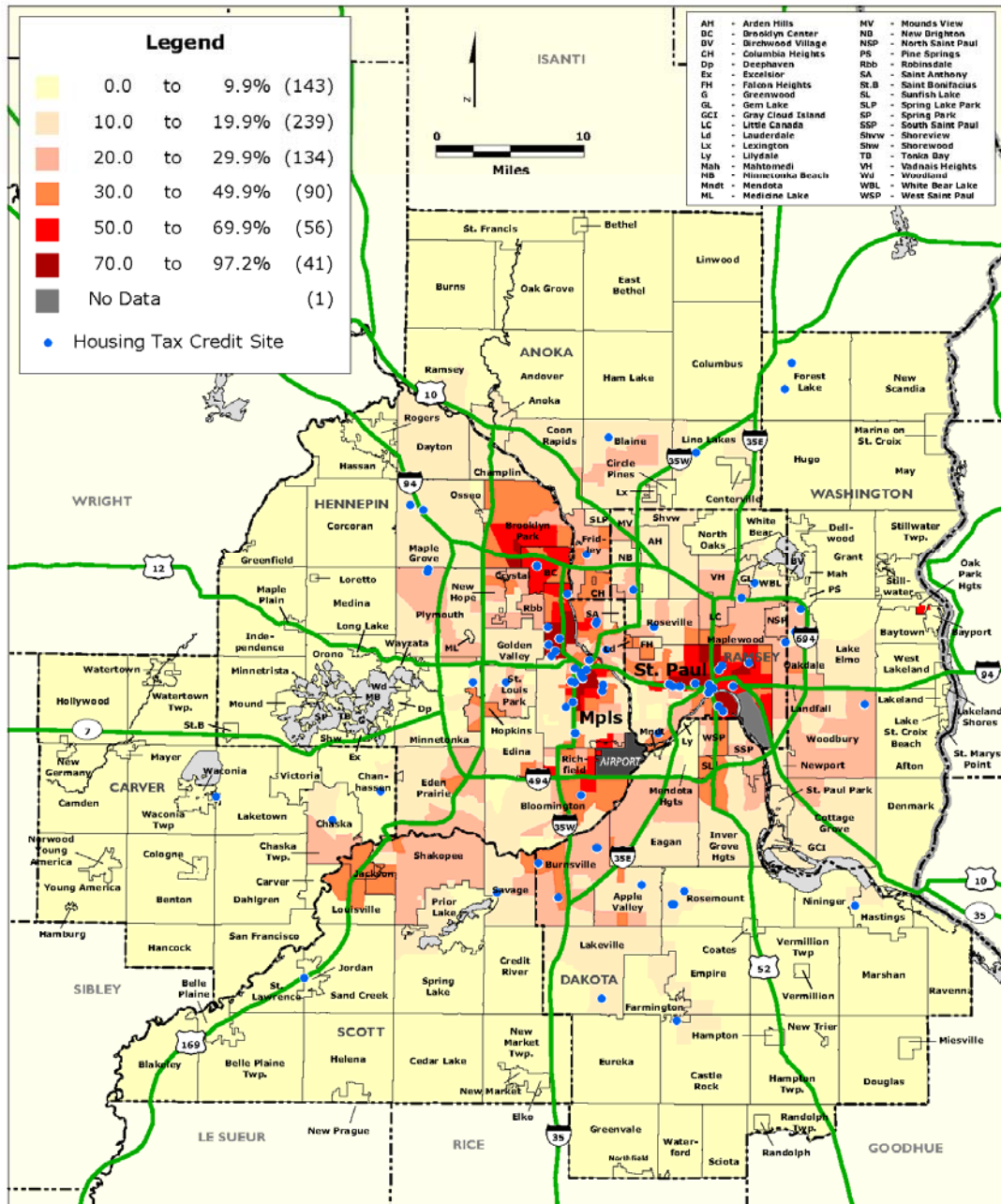
It is also possible that suburban units could have been developed at lower expense than central city units. Over the last six years the average subsidy per unit according to MHFA in the central cities was \$8,219. In the suburbs it was \$7,934. In this light, it is noteworthy that, according to the Dakota County Community Development Agency, rents in the projects they have built are much more affordable in terms of both the government subsidy and the tenant rent than those in equivalent central city units. Such suburban units would have provided not only shelter to children living in them but access to schools with much better graduation and college attendance rates.

The state's system of sub-allocators is also highly segregative. Because it focuses so much effort on the two central cities, it has been a clear impediment to integration which the state does not identify in its Analysis of Impediments to Fair Housing Choice. The placement of the low-income housing tax credit by the Minneapolis and Saint Paul sub-allocators appears to be as segregative as the conduct by the City of Minneapolis which led to the successful fair housing law suit in *Hollman v. Cisneros*.<sup>17</sup> Because of the extremely segregative conduct of the central city sub-allocators, Minnesota Housing's obligation to create a pro-integrative scoring system for proposals is even more clear.

<sup>17</sup> Civ. No. 4-92-712 (D. Minn. filed Apr. 21, 1995); see also Timothy L. Thompson, *Promoting Mobility and Equal Opportunity: Hollman v. Cisneros*, 5 J. Affordable Housing & Community Dev. L. 237, 237 (1996).



# **MINNEAPOLIS - SAINT PAUL REGION** **Percentage Minority Population by Census Tract, 2010** **and Housing Tax Credit Allocation Projects,** **2005-2011**



Data Sources: U.S. Census Bureau, Minnesota Housing Finance Agency.

Furthermore, under the QAP—contrary to the clear requirements of the Fair Housing Act—Minnesota awards no points for racial integration at all in the proposal evaluation process. Only one or two points are awarded for a potential project in low poverty areas. In contrast, virtually all of the other criteria—worth well over 100 points—appear to promote the placement of units in areas of minority concentration or resegregation. For example, “readiness to proceed” favors areas with less community opposition (24 points). In addition, “rehabilitation of existing structures” (10 points), “being part of community revitalization plan” (2 points), “using existing water or sewer” (10 points), “foreclosed properties” (10 points), “preservation of existing credits” (10 points) “permanent housing for the homeless” (110 points) “minimizing transportation costs” (3 points) “serves lowest income tenants” (13 points), “local philanthropic contribution” (which favors local CDCs operating in segregated neighborhoods) (10 points) would all seem to favor core city projects over areas where the schools are white or integrated and high-performing.<sup>18</sup> Even housing growth (10 points), which would generally appear to be pro-integrative by favoring suburbs, actually prioritized housing in Minneapolis and St. Paul in recent years when the cities led the region in new housing starts. Most recently, in 2010 the state agency added a criterion for “transit oriented development” which, if given effect, could increase the segregation of schools, particularly on the Central Corridor between Minneapolis and Saint Paul.

While some of the proposed changes to the QAP may slightly ameliorate this bias, most of the proposed changes actually make the system more segregative. Specifically, revising the targeting of the State Designated Basis Boost to areas that have community revitalization plans, historic buildings, and a high proportion of government supported housing is segregative. Other changes, such as revising the top growth community criteria, philanthropic contribution credit, and non-financial readiness to proceed could have very minor integrative effects, but will not change the overall segregative character of the QAP scoring criteria.<sup>19</sup>

The QAP must reflect the federal fair housing framework for stable metropolitan racial integration (SMRI) as articulated in the site and neighborhood standards developed under the authority of the 1) Fair Housing Act, 2) the Civil Right Act of 1964, and 3) the equal protection clause of the U.S. Constitution.<sup>20</sup> These site and neighborhood standards are codified at 24 C.F.R. section 941.202.<sup>21</sup>

For purposes of stable metropolitan racial integration, the Fair Housing Act creates three types of metropolitan neighborhoods or communities:

1) “*Areas of minority concentration,*”<sup>22</sup> or neighborhoods or communities with more than 30 percent non-white population in housing and/or neighborhood schools. These are neighborhoods or communities that are largely non-white and poor, or on a clear path toward

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<sup>18</sup> See Minnesota Housing, Self-Scoring Worksheet, 2012 Housing Tax Credit Program. (Scoring Criteria) available at [http://www.mnhousing.gov/idc/groups/multifamily/documents/webasset/mhfa\\_010882.rtf](http://www.mnhousing.gov/idc/groups/multifamily/documents/webasset/mhfa_010882.rtf).

<sup>19</sup> See Proposed Revisions to the Qualified Allocation Plan (QAP) and Procedural Manual, 2013 Housing Tax Credit Program.

<sup>20</sup> See Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 Vand.L.Rev 1747, 1763-1776 (2005).

<sup>21</sup> See also *Shannon v. United States Dep’t of Housing and Urban Development*, 436 F.2d 809 (3d Cir. 1970).

<sup>22</sup> 24 C.F.R. § 941.202 (c)(1)(i) (2010).

racial and social segregation and disinvestment caused by housing discrimination. Under the Fair Housing Act, “color blindness is not permissible” in areas of minority concentration and the “increase of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with national housing policy.”<sup>23</sup>

2) “*Racially mixed areas*”<sup>24</sup> or neighborhoods or communities that are presently integrated, but where integration is fragile and subject to resegregation. These are neighborhoods or communities with a white and middle income majority, whose racial and economic stability is threatened by illegal and un-redressed housing discrimination including, but not limited to, a) steering by real estate agents, b) individual and geographic credit discrimination, c) discriminatory placement of government sponsored low-income family housing, d) discriminatory drawing of sub district school district attendance area boundaries or catchment areas<sup>25</sup>, and e) other discriminatory housing or education practices by state governments or by surrounding local governments. The Fair Housing Act requires HUD to consider the racial balance of schools attended by government-supported housing recipients.<sup>26</sup> The clear implication of this legal requirement is that stably racially integrated schools are a central component of SMRI enforcement.<sup>27</sup>

3) All other neighborhoods or communities that are predominantly white and middle or upper income and under no threat of resegregation caused by housing discrimination. A subset of these neighborhoods includes “high opportunity neighborhoods or communities” (HOC). HOCs are defined to include the region’s: a) best performing and best funded local public schools (which must also be either predominantly white and low-poverty or stably racial and economically integrated); b) best health facilities, services, and outcomes; c) best municipal facilities and services at a given tax rate, d) highest growth of entry level employment; e) highest concentration of luxury housing; and f) strongest, federally guaranteed, low cost prime credit market for housing and businesses redevelopment.<sup>28</sup> SMRI policy requires that these types of communities be prioritized for the placement of new government subsidized family housing. Research not only shows this approach is necessary for SMRI, but also shows that placement of housing in HOCs provides the best result for advances in educations and employment success.<sup>29</sup>

The QAP should be redrafted to change the implied pro-segregative incentives to pro-integrative ones. Under the Federal Fair Housing Act, 75 percent of projects should be pro-integrative or, at a minimum, the allocation plan must provide more pro-integrative siting decisions than segregative ones in each cycle.<sup>30</sup> All segregative decisions must occur in the context of a properly prepared community revitalization plan that will actually revitalize the

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<sup>23</sup> *Shannon*, 436 F.2d at 821.

<sup>24</sup> 24 C.F.R. § 941.202 (c)(1)(ii) (2010).

<sup>25</sup> See *Keyes v. Denver School District*, 413 US 189 (1973)(outlined standards for fair drawing of school catchment areas and declaring that housing and school segregation are reciprocally related).

<sup>26</sup> See 436 F.2d at 822

<sup>27</sup> *Keyes*, 413 U.S. at 201 (segregated school boundary drawing and segregated housing patterns have reciprocal effects).

<sup>28</sup> 24 C.F.R. § 941.202 (c)(2)(g); The Fair Housing Acts requires that HUD must consider 1) the racial balance of schools attended by government supported housing recipients, 2) the location of middle income and luxury housing, and 3) the availability of federally guaranteed low cost loans. See *Shannon*, 436 F.2d at 822.

<sup>29</sup> See IRP, “A Comprehensive Strategy to Integrate Twin Cities Schools and Neighborhoods,” pp. 9-12, <http://www.irpumn.org>, for a review the research documenting the benefits of integrated schools.

<sup>30</sup> See *Gautreaux v. Chicago Hous. Auth.*, 304 F. Supp. 736, 737-38 (N.D. Ill. 1969).

neighborhood (as measured by school characteristics, the share of middle-income residents, and local business vitality). A plan that simply represents the status quo regarding segregation is impermissible under Title VIII.

The new criteria must incentivize the placement of units in high opportunity communities, or geographic areas with low-poverty, high-performing schools with less than 30 percent of the children qualifying for free or reduced cost lunch, and with less than 30 percent non-white students. In addition to integrated schools, the QAP should incent housing in cities and school districts with high levels of new entry level job growth, high fiscal capacity and low local tax rates, the best public health statistics, and the lowest crime rates.

The MHFA should redraft its QAP to conform to the requirements of the Federal Fair Housing Act and use its all of its “immense leverage” to further integrated and balanced living patterns.<sup>31</sup> Its scoring system should incent stable racial integration. It is both good policy for the region and it is the law of the land.

Sincerely,

Myron Orfield  
Professor of Law  
Director of the Institute on Race & Poverty

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<sup>31</sup>See *NAACP v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149 (citing *NAACP v. Harris*, 567 F. Supp. 637, 644 (D. Mass. 1983)). The First Circuit pragmatically argued the legislative history reflects an intention that HUD should “use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.” *NAACP*. 817 F.2d at 155.

## Appendix VII: IMO Comments on the Minneapolis FY 2012 Consolidated Plan for Housing and Community Development



April 13, 2012

Mr. Matt Bower  
Office of Grants and Special Projects  
307M City Hall  
350 South Fifth Street  
Minneapolis, MN 55415

Re: Comments of Myron Orfield on Minneapolis FY 2012 Consolidated Plan for  
Housing and Community Development

To Whom It May Concern:

I submit these comments to supplement my public comments at the City Council's public hearing on April 3, 2012. I oppose the city's proposal to permit the city to use HOME and other federal affordable housing funds to build additional low income housing in neighborhoods that are up to 50 percent non-white. I am concerned that lifting the current 30 percent restriction would intensify already rapidly increasing racial segregation in violation of the city's obligation to affirmatively further fair housing.<sup>1</sup>

Existing federal regulations prohibit the city from using these funds in neighborhoods that are more than 30 percent non-white.<sup>2</sup> The Fair Housing Act forbids building a disproportionate share of low income housing in poor and segregated, or integrated but resegregating, neighborhoods, when it is possible to build that same housing in low poverty, high opportunity white or stably integrated neighborhoods.<sup>3</sup> Under the Fair Housing Act, "color blindness is not permissible" in the decision to add low income housing units to poor segregated neighborhoods or unstably integrated neighborhoods.<sup>4</sup> Courts in these circumstances have held that the "increase ... of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy."<sup>5</sup> Moreover, the courts have made patently clear that, "increasing or maintaining racially segregated housing patterns merely because

<sup>1</sup> Federal Fair Housing Act, 42 U.S.C. §§ 3601 et seq.; 5304(b) (2006).

<sup>2</sup> See 24 C.F.R. §§ 92.202; 941.202; 983.57(e)(2) & (e)(3) (2011).

<sup>3</sup> See *Shannon v. United States Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 820 (3d Cir. 1970) (finding that "increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy" and therefore concluding that housing authorities should not site new housing in racially concentrated areas if there are viable alternatives); see also 24 C.F.R. § 941.202(g) (requiring public housing sites to be accessible to "educational, commercial, and health facilities and services" that are "at least equivalent to those typically found in neighborhoods consisting largely of similar unassisted standard housing" (emphasis added)).

<sup>4</sup> *Shannon*, 436 F.2d at 820; see also 24 C.F.R. § 941.202(g).

<sup>5</sup> See 436 F.2d at 821; 24 C.F.R. § 941.202; 983.57(e)(2).

minority groups will gain an immediate benefit would render such persons willing, and perhaps unwitting, partners in the trend toward ghettoization of our urban centers.”<sup>6</sup> As Judge Cote wrote in her *Westchester* summary judgment opinion:

The HUD Guide explains that while it is often the case that minorities are disproportionately represented among the low-income population, simply providing affordable housing for the low-income population “is not in and of itself sufficient to affirmatively further fair housing.” This unsurprising statement is grounded in the statutory and regulatory framework behind the obligation to AFFH, which as already discussed, is concerned with addressing whether there are independent barriers to protected classes exercising fair housing choice. As a matter of logic, providing more affordable housing for a low income racial minority will improve its housing stock but may do little to change any pattern of discrimination or segregation. Addressing that pattern would at a minimum necessitate an analysis of where the additional housing is placed.<sup>7</sup>

The city seeks to become more segregated based on the provisions of 24 C.F.R section 983.57(e)(3), which states that the cities must assure:

[A] reasonable distribution of assisted units each year, that, over a period of several years, will approach an appropriate balance of housing choices within and outside areas of minority concentration. An appropriate balance in any jurisdiction must be determined in light of local conditions affecting the range of housing choices available for low-income minority families and in relation to the racial mix of the locality’s population.

The city was also limited by terms of the *Hollman v. Cisneros* consent agreement.<sup>8</sup> Although the agreement is no longer in force, its definition of areas of minority concentration remain in effect in the city housing plan. The city never even attempted to comply with this promise. Even while enjoined by the *Hollman* decree, the city continued to locate low income housing in a manner that increased racial segregation. At the time of the *Hollman* lawsuit in 1992, plaintiffs alleged that 68 percent of scattered site housing was placed in neighborhoods that were more than 30 percent non-white. Recent HUD data show that the situation has not improved—in fact, it has worsened. The data show that **80 percent** of the Low-Income Housing Tax Credit (LIHTC) units through 2009 and **85 percent** of all subsidized units were sited in neighborhoods that are more than 29 percent non-white, the limit set by the decree (see Appendix Maps 1–2 and Table 1) and rules. Even under existing guidelines, the city has hyper-segregated low income housing in neighborhoods of minority concentration. It now wants permission to do by law what has been doing improperly. It is fair to predict that, if given this permission, the city will build virtually all of its low income housing in areas of minority concentration and none in a pro-integrative fashion. It is important to

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<sup>6</sup> *Otero v. New York City Hous. Authority*, 484 F.2d 1122, 1134 (2d Cir. 1973).

<sup>7</sup> *See United States of America ex rel Anti-Discrimination Center of Metro New York v. Westchester County*, 668 F. Supp. 2d 548, 564–65 (S.D.N.Y. 2009).

<sup>8</sup> *See Hollman v. Cisneros*, Civ. No. 4-92-712 (D. Minn. Apr. 21, 1995); Timothy L. Thompson, *Promoting Mobility and Equal Opportunity: Hollman v. Cisneros*, 5 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 237, 248 (1996).

note that a federal court reviewing a very similar factual pattern of LIHTC siting recently held the pattern constituted a disparate impact violation of the Federal Fair Housing Act.<sup>9</sup>

The evidence is clear that there are no comparable housing choices for minority families in areas outside minority-concentrated neighborhoods. The city has undertaken no factual inquiry on this subject that would justify the rational belief that its plan would increase choices for non-white families. Loosening civil rights law will have the opposite effect, decreasing choice and intensifying segregation. The “local conditions” and the present highly segregated state of the city prove the fallacy of the city’s plan.

Contrary to the city’s position, it is also clear that the concentration of subsidized units in areas of minority concentration for purposes of revitalization, 26 U.S.C. section 42, does not present a “compelling government interest” in the face of the clear and powerful remedial civil rights commands of the Equal Protection Clause of the Constitution and the Fair Housing Act.<sup>10</sup> It is beyond doubt that urban revitalization goals and incentives must be harmonized with and subordinated to superseding constitutional and statutory fair housing law. It is neither legal—nor possible—to revitalize a community by deepening governmental racial discrimination and housing segregation.<sup>11</sup>

### **The City’s Proposal Intensifies School Segregation in Minneapolis**

The Fair Housing Act requires Minnesota Housing and all state sub-allocators to consider the racial balance of schools attended by government-supported housing recipients.<sup>12</sup> The clear implication of this legal requirement is that stably racially integrated schools are a central component of fair housing policy. Similarly, the Supreme Court has repeatedly held that school and housing segregation are reciprocally related and the patterns of illegal housing segregation causes school segregation and, similarly, that illegal school segregation causes segregation in housing.<sup>13</sup>

HUD’s Fair Housing Equity Assessment Grant Applications, for example, require grant recipients—such as the Met Council’s Corridors of Opportunity Program—to monitor not only the racial balance of local schools but their academic performance.<sup>14</sup>

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<sup>9</sup> See *Inclusive Communities Project v. Texas Dep’t of Hous. and Community Affairs*, 2012 WL 953696 (N.D. Tex., March 20, 2012); 749 F.Supp. 2d. 486 (N.D. Tex. 2010).

<sup>10</sup> See 749 F. Supp. 2d. at 503–04.

<sup>11</sup> See *id.*

<sup>12</sup> *Shannon v. United States Dep’t of Hous. and Urban Dev.*, 436 F.2d 809, 822 (3d Cir. 1970); 24 C.F.R. § 941.202(c) (2011). The Fair Housing Act dictates that HUD must consider 1) the racial balance of schools attended by government supported housing recipients, 2) the location of middle-income and luxury housing, and 3) the availability of federally guaranteed low cost loans. See 42 U.S.C. § 3601 et seq.; 24 C.F.R. § 941.202(c).

<sup>13</sup> See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20–21 (1971); *Keyes v. Sch. Dist. No. 1, Denver, Colorado*, 413 U.S. 189, 202–03 (1973); *Milliken v. Bradley*, 418 U.S. 717, 755 (1974).

<sup>14</sup> See *Addressing Equity and Opportunity: The Regional Fair Housing and Equity Assessment (FHEA) Grant Obligation* (August 2011), [http://www.prrac.org/pdf/Regional\\_FH\\_Equity\\_Assessment\\_HUD\\_Aug\\_2011.pdf](http://www.prrac.org/pdf/Regional_FH_Equity_Assessment_HUD_Aug_2011.pdf).



Additionally, on February 23, 2010, Secretary Shaun Donovan clarified HUD's fair housing requirements for its state grantees before Congress, stating:

[S]ustainability also means creating “geographies of opportunity,” places that effectively connect people to jobs, *quality public schools*, and other amenities. Today, too many HUD-assisted families are stuck in neighborhoods of concentrated poverty and segregation, where one's zip code *predicts poor educational*, employment, and even health outcomes. These neighborhoods are not sustainable in their present state.<sup>15</sup>

In the Minneapolis school desegregation case, *Booker v. Special School District No. 1*, a federal district court found the Minneapolis school system to be *de jure* segregated. In making this finding, the federal court specifically noted that the city's housing markets were intentionally racially segregated<sup>16</sup> and that the city's housing policy had in part caused the segregation of the school system.<sup>17</sup> Today, Minneapolis schools remain highly segregated and virtually all predominantly non-white schools in the system are in the aforementioned minority-concentrated neighborhoods, while no predominantly white schools and very few integrated schools are in those neighborhoods (see Appendix Map 3).

Federal law unambiguously requires a city to consider the racial and social composition of local schools in its siting of affordable housing.<sup>18</sup> This is the case in a unitary school system, free of segregation. The city's refusal to abide by this federal requirement in its non-unitary, dual school system is contrary to federal rules.<sup>19</sup>

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<sup>15</sup> Press Release, HUD, Written Testimony of Shaun Donovan: FY2011 Budget Request for HUD (Feb. 23, 2010) (emphasis added), *available at* <http://portal.hud.gov/hudportal/HUD?src=/press/testimonies/2010/2010-02-23>.

<sup>16</sup> 351 F. Supp 799, 806 (“The record indicates a high degree of residential segregation within the boundaries of the defendant School District. The near north side of the City and a large portion of south central Minneapolis contain heavy concentrations of minority groups. At the same time, the perimeter of the city is largely White. Residential segregation in Minneapolis is in large part due to racial discrimination. Prior to 1962 it was common practice for members of the Board of Realtors to only show minority persons houses in certain areas.”).

<sup>17</sup> In fact, the schools sued the Minneapolis Housing and Redevelopment Authority (MHRA) and HUD, arguing that their segregated housing policy had frustrated the district's efforts to comply with court-ordered desegregation by building low income housing on the near north side of Minneapolis, which increased the concentration of minority residents in that area of the city. See Cheryl W. Heilman, *Booker v. Special School District No. 1: A History of School Desegregation in Minneapolis, MN*, 12 LAW & INEQ. 127, 166 (1993) (citing *Booker v. Special School Dist. No. 1*, No. 4-71 Civ. 382 (D. Minn. Aug. 8, 1979)). However, the court dismissed the complaint as untimely. *Id.* When later interviewed, Judge Larson said that he had made a serious mistake in dismissing the complaint. *Id.*

<sup>18</sup> *Shannon v. United States Dep't of Hous. & Urban Dev.*, 436 F.2d 809, 820 (3d Cir. 1970) (finding that “increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy” and therefore concluding that housing authorities should not site new housing in racially concentrated areas if there are viable alternatives); see also 24 C.F.R. § 941.202 (2011) (requiring public housing sites to be accessible to “educational, commercial, and health facilities and services” that are “at least equivalent to those typically found in neighborhoods consisting largely of similar unassisted standard housing” (emphasis added)).

<sup>19</sup> The federal court in the *Booker* case dissolved its desegregation order, but it did so relying on the state's school desegregation rule, and never declared that the school district had achieved unitary status. See, e.g., Derek W. Black, Testimony before Minnesota Department of Education Integration Revenue Replacement

Regrettably, the city's housing planning documents noticeably neglect any reference to schools, except to assert—on the basis of non-peer-reviewed, housing industry “studies”—that building more low income housing in poor neighborhoods will improve school performance.

Because of this *intensified* pattern of racially segregative construction of low-income housing, in clear disregard of federal housing rules, the Minneapolis public school system has become more—not less—racially and socially segregated than it was when the *Booker* and *Hollman* lawsuits were filed. In 1995, there were ten schools in Minneapolis that were more than 90 percent non-white.<sup>20</sup> Those schools represented nine percent of Minneapolis schools.<sup>21</sup> In 2010, there were 33 schools that were more than 90 percent non-white, representing 39 percent of all schools.<sup>22</sup> Similarly, at the time of the *Hollman* settlement, there were 41 Minneapolis schools that were more than 70 percent non-white, representing 35 percent of Minneapolis schools.<sup>23</sup> By 2010, this number had risen to 57 schools representing 65 percent of all Minneapolis schools.<sup>24</sup> These schools are overwhelmingly composed of poor children and have some of the lowest standardized test scores of all schools in Minnesota.

Due to the profound segregation of its schools and housing, Minneapolis has experienced an enormous flight of children of all races from its schools. Since 1995, enrollment has declined 26 percent, with most of the losses in the areas where low income housing was predominant.

### **Research Demonstrates the Likely Detrimental Effects of Subsidized Housing in Moderate- and High-Poverty Areas**

The city's new consolidated plan would potentially intensify the city's pattern of racial segregation by expanding the neighborhoods eligible for subsidized housing to include census tracts with minority shares between 29 and 50 percent. Our research at the Institute on Race and Poverty shows that these types of neighborhoods are at high risk of resegregating.<sup>25</sup> This research implies that neighborhoods with minority shares of roughly 30 percent or more are more likely to become segregated than to remain integrated. This means that the neighborhoods the city intends to make eligible for subsidized housing are precisely the ones at the threshold of transition.

Moreover, peer-reviewed research on the effects of subsidized housing on nearby properties implies that these types of neighborhoods are also most likely to be adversely

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Task Force Hearing on School Diversity and Integration (Dec. 20, 2011), *available at* [http://www.school-diversity.org/pdf/Black\\_Minnesota\\_testimony\\_12-20-11.pdf](http://www.school-diversity.org/pdf/Black_Minnesota_testimony_12-20-11.pdf).

<sup>20</sup> Calculated from Minnesota Department of Education data.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See Institute on Race and Poverty, *A Comprehensive Strategy to Integrate Twin Cities Schools and Neighborhoods* 20–22 (July 2009), [http://www.irpumn.org/uls/resources/projects/Regional\\_Integration\\_Draft\\_3\\_-\\_Long\\_Version.pdf](http://www.irpumn.org/uls/resources/projects/Regional_Integration_Draft_3_-_Long_Version.pdf).

affected by the addition of subsidized housing. For instance, George Galster's literature review concluded that neighborhood characteristics influence how subsidized housing affects surrounding areas and that there is growing evidence that neighborhoods with moderate home values and poverty rates are at greater risk of experiencing negative effects, even at lower concentrations of affordable or multi-family housing. Finally, he also concluded that "affordable housing seems least likely to generate negative impacts when inserted into high-value, low poverty, stable neighborhoods."<sup>26</sup>

Similarly, a literature review by Khadduri et al. of Abt Associates concluded that the effect of subsidized housing on nearby properties "appears to depend on the scale of the project and the stability of the neighborhood. A small project in a stable neighborhood has either no effect or a small positive effect. On the other hand, a project added to an unstable neighborhood, especially a large project, can either cause a decline in property values or prevent revitalization that would otherwise occur as a result of market forces."<sup>27</sup>

### **The City's "Market-Building Strategy" Is Flawed and Unfounded in Evidence**

When the Institute on Race and Poverty informed city representatives of these articles, they responded, essentially without any evidence, that concentrating low-income housing subsidies in moderate-minority, moderate-poverty neighborhoods would help build the housing markets in these areas. They argued, among other things, that LIHTC housing "was not really affordable housing," but rather "market rate housing" with higher rents than the local markets. They also contended that the city had to use the LIHTC units in segregated neighborhoods because "the market was providing no private credit" there, while white neighborhoods of the city were brimming with credit and new rental housing. Those areas received no LIHTC units because they were thriving. The poor segregated neighborhoods which had no private market had to be revitalized with more low income family housing.

In support of this so-called "market building" strategy, the only evidence the city provided was a non-peer reviewed government report and a glossy industry trade publication that asserted—without any reviewable facts—that low income housing helped build the housing market in a poor, all-white rural county in Indiana. When questioned about the relevance of this "study" for construction of housing in racially segregated neighborhoods, particularly in light of several peer-reviewed studies to the contrary, the city could not produce relevant evidence that further concentrating low income housing in racially segregated neighborhoods would build these housing markets.

As I prepared this letter, city representatives responded with another article—a literature review by the Center for Housing Policy (CHP) prepared for the MacArthur

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<sup>26</sup> George Galster, *The Effects of Affordable and Multi-Family Housing on Market Values of Nearby Homes*, in GROWTH MANAGEMENT AND AFFORDABLE HOUSING 176–211 (Anthony Downs, ed., 2004).

<sup>27</sup> JILL KHADDURI, KIMBERLY BURNETT & DAVID RODDA, TARGETING HOUSING PRODUCTION SUBSIDIES: LITERATURE REVIEW, Abt Associates, Cambridge MA (2003), 41, 63.

Foundation.<sup>28</sup> This piece was not peer-reviewed, but it is a reasonable summary of the literature. However, a significant part of it focuses on the economic effects of the construction activity associated with these programs and not on the question of longer-term economic effects on the neighborhoods themselves. The effects from construction activities are short-lived and are unlikely to be felt primarily by neighborhood residents. In addition, impact studies of this sort commonly overstate secondary effects (often called multiplier effects).

The CHP review also highlights other issues of only limited relevance in the current case. These include effects on homebuyers, which are not relevant for the LIHTC and Section 8 programs at issue in Minneapolis. There is also a good discussion of how affordable housing can help local employers by providing housing for low- and moderate-wage workers. However, this argument is much more relevant for projects in areas where the non-subsidized market is high-rent or all owner-occupied, which is not the case in the Minneapolis neighborhoods in question. There is also some discussion of how projects affect nearby market values. This information is relevant, but the review focuses on only a particularly rosy evaluation of a single study in New York City, with no mention of the broader reviews noted above. Finally, there is a section on other potential spillover effects—an issue that is potentially very relevant. However, the section essentially highlights the lack of findings in this regard and recommends that more research is needed on the issue.

The city has practiced its “market building” strategy for many years and the approach has twice been found illegal by federal courts. All that it can show for its strategy is neighborhoods and schools that are more segregated, disinvested, and more economically and socially isolated. The city has—through its actions and inactions—shaped the racially segregated nature of the north and south neighborhoods, more than any other governmental entity. It now justifies further concentrating low income housing projects in these neighborhoods by arguing that there is no private mortgage money to support development in the already-segregated neighborhoods that it helped to create. While these neighborhoods have been redlined, and more recently exploited by the private subprime financial market, the city has undertaken no fair housing action of any kind to respond to this discrimination (see Appendix Maps 5–8). Moreover, while cities like Memphis and Baltimore have challenged the conduct of Wells Fargo bank, the city of Minneapolis has taken no action in the face of far greater racial lending disparities.<sup>29</sup>

### **As an LIHTC Sub-allocator, the City Helped to Dismantle a Regional Pro-Integrative Housing Strategy**

In 1985, the city used its political power with the legislature to seek the creation of central city sub-allocators of the tax credit to ensure that it would receive a higher than proportional allocation of LIHTC units. In doing so, the city undermined the nation’s

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<sup>28</sup> Keith Waldrip, Laura Williams & Suzanne Hague, *The Role of Affordable Housing in Creating Jobs and Stimulating Local Economic Development: A Review of the Literature*, Center for Housing Policy (2011).

<sup>29</sup> See, e.g., Institute on Race and Poverty, *ComError! Hyperlink reference not valid.munities in Crisis: Race and Mortgage Lending in the Twin Cities* (February 2009), [http://www.irpumn.org/website/projects/index.php?strWebAction=project\\_detail&intProjectID=51](http://www.irpumn.org/website/projects/index.php?strWebAction=project_detail&intProjectID=51).

most effective pro-integrative housing system. The director of the Minnesota Housing Finance Agency, Jim Solem, opposed the proposal, as did the chair of the Metropolitan Council, on the grounds that these sub-allocators would thwart the pro-integrative regional fair housing system that had been developed under clear HUD regulation—Metropolitan Council Policy 39.

Nevertheless, the city of Minneapolis pursued the strategy, knowing that during the Reagan administration, HUD would not question its strategy. It is noteworthy that one the most effective and pro-integrative HUD- supported housing plans in U.S. history—the Metropolitan Council’s Policy 39—was not undermined by white suburban opposition, but instead by central city politicians and developers.

### **The City’s Qualified Allocation Plan Incentivizes Segregative Housing Placement**

Together, Minneapolis and St. Paul have also adopted a qualified allocation plan (QAP) that directly incentivizes the segregative placement of low-income units within the cities.<sup>30</sup> Specifically, the central cities’ QAP gives over 100 points for projects likely to be in high-minority, high-poverty neighborhoods, no points for racially integrated projects, and only 10 points for “economic integration.” (By the cities’ definition, an economically integrative project is one in a neighborhood that is up to 50 percent non-white and with no limits on non-white and/or poor kids in local schools.<sup>31</sup>) A federal court recently found a similar QAP in Dallas to be a disparate impact violation of the Fair Housing Act.<sup>32</sup>

### **Minneapolis Must Fulfill Its Federal Fair Housing Obligations**

The city’s intransigence, twice acknowledged in court cases, should not be rewarded by HUD. Currently, the city has no civil rights plan. Moreover, it has no concerted desegregation plan to integrate segregated neighborhoods or to stabilize existing, tenuously integrated neighborhoods.

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<sup>30</sup> See Minneapolis/Saint Paul Housing Finance Board Low Income Housing Qualified Allocation Plan, available at [http://www.ci.minneapolis.mn.us/www/groups/public/@cped/documents/webcontent/convert\\_254711.pdf](http://www.ci.minneapolis.mn.us/www/groups/public/@cped/documents/webcontent/convert_254711.pdf); see also Memorandum from Myron Orfield to Gloria Stiehl, Minnesota Department of Employment and Economic Development, Comments on 2011 Minnesota Analysis of Impediments to Fair Housing Choice (Dec. 31, 2011), 13–14 (attached as Appendix) (outlining how the qualified allocation plan incentivizes segregative placement of low-income units within the metropolitan area).

<sup>31</sup> Minneapolis and St. Paul have created qualified allocation plans (QAPs) that provide 10 points for a segregated redevelopment area, 10 points for Hennepin Home program match (in segregated neighborhoods), up to 20 points for working with non-profits (who, in Minneapolis, virtually all operate only in segregated neighborhoods), 5 points for projects with established resident aid programs (all in segregated neighborhoods), 5 points for projects with the support of neighborhood groups, up to 20 points for rehabilitation (again, almost all existing projects are in segregated neighborhoods), up to 15 points for projects with previous subsidies, up to 15 points for project with additional financial additional support, up to 15 points for intermediary support, and up to 10 points for the most active transit corridors. There are no points for racial integration and only 10 points for economic integration. See *id.*

<sup>32</sup> See *Inclusive Communities Project v. Texas Dep’t of Hous. and Community Affairs*, 2012 WL 953696 (N.D. Tex., March 20, 2012); 749 F.Supp. 2d. 486 (N.D. Tex. 2010).

To fulfill its fair housing obligations, the city relies on an inadequate analysis of impediments to fair housing choice completed by a consortium of metropolitan cities. The analysis does not address the placement of government-sponsored housing, it has no analysis of existing evidence of discrimination, and it does not include any testimony from organizations that study housing discrimination. It is essentially a boilerplate document that lacks adequate civil rights analysis.

### **The Public Hearing Structure Was Seriously Flawed**

When I requested time to be heard at the City Council's April 3, 2012 public hearing on the consolidated plan, I was only allowed three minutes to testify. Not only were three minutes insufficient for meaningful remarks, but after my short remarks were attacked for over twenty-five minutes, I was not permitted any time to respond. The response by city housing staff included many statements that were demonstrably incorrect. They also included *ad hominem* attacks which misstated or exaggerated my positions.<sup>33</sup>

It is my firm opinion that the city's sub-allocation authority impedes fair housing choice in the region. Minneapolis, even after *Booker* and *Hollman*, still fails to administer its federal housing programs in ways that affirmatively further fair housing. The records of the Metropolitan Council and Minnesota Housing, while far from perfect, are much better. In light of this, I believe there is no justification to loosen the requirements on the city by granting the requested exemption from federal fair housing principles.

Sincerely,

Myron Orfield  
Professor and Director  
Institute on Race and Poverty  
University of Minnesota Law School

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<sup>33</sup> For instance, staff stated that my request to keep the current caps would mean that no affordable housing could ever be built in poor neighborhoods. They also said that I ignored clear evidence that they had given to me on numerous occasions that showed how the city's housing plans will revitalize these neighborhoods—a comment that is particularly unjustified in light of how little evidence city staff have been willing to cite. Only in the last week have city staff produced any research supporting their revitalization claims, and, as noted above, the cited evidence is relatively weak. Finally, a city official gratuitously asserted that “Orfield believed that any time non-whites chose to live together it caused decline.” I was not allowed to respond.

## Appendix VIII: IMO Comments on the Central Corridor Affordable Housing Coordinated Plan



November 2, 2012

Mr. Jonathan Sage-Martinson  
Director Central Corridor Funder's Collaborative  
451 Lexington Parkway North  
Saint Paul, MN 55104

Dear Mr. Sage-Martinson:

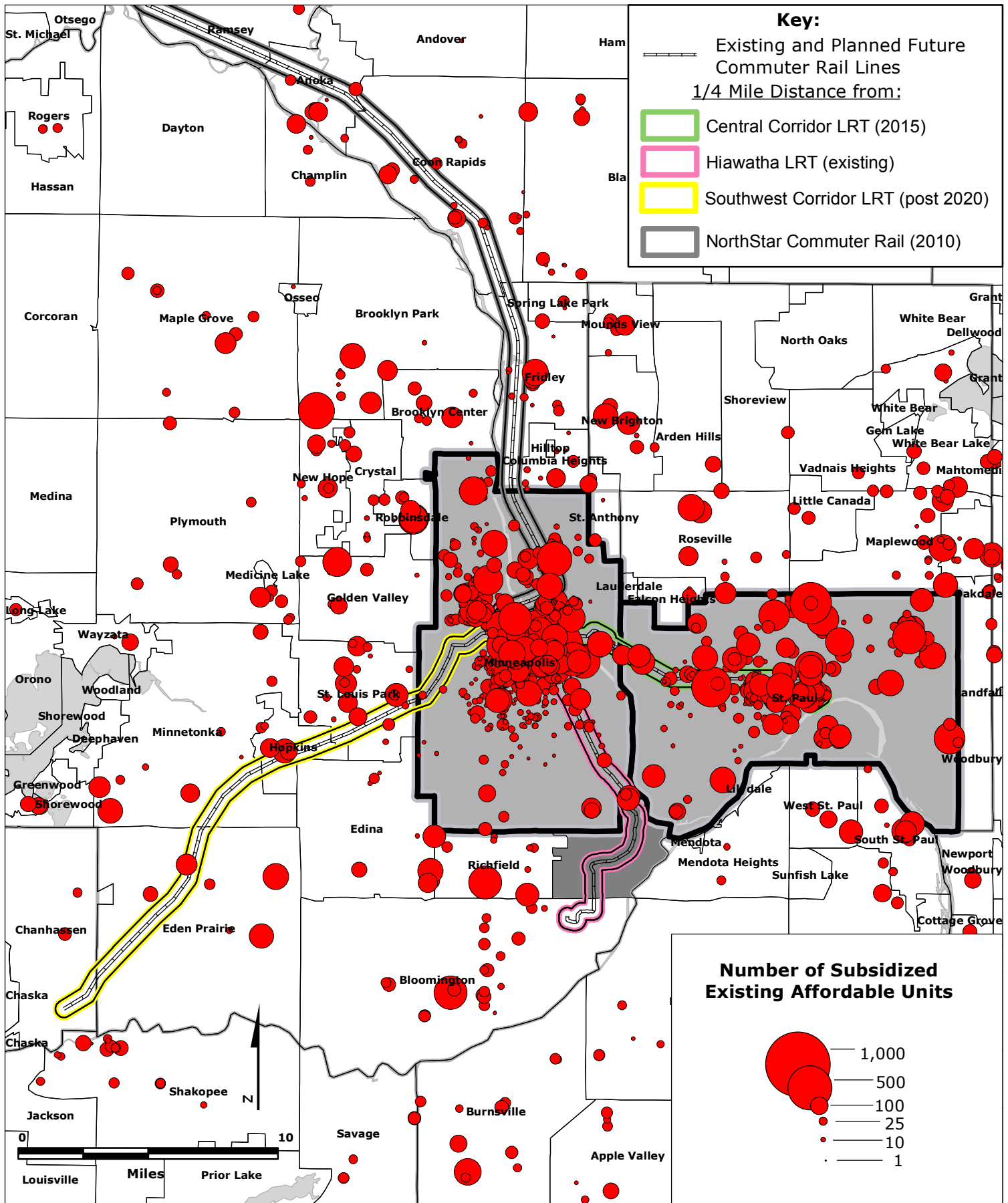
I write to express my concern with the policy recommendations of the Central Corridor Affordable Housing Coordinated Plan: Recommended Policies and Strategies (CCAHP—Report by Twin Cities LISC, January 2012). It is my understanding that LISC, the report's author, is attempting to have the report's recommendations adopted as official government policy. The CCAHP strategies, if adopted, will dramatically increase racial and economic segregation and at the same time decrease the possibility of greater integration in the Twin Cities. The report's recommendations are detrimental to the region and contrary to both the Fair Housing Act (FHA) and the purpose of the HUD grant supporting the research. The report should be redrafted and attempts to have it adopted by any unit of government should stop.

I take the formal step of writing because I have repeatedly tried to raise the concerns expressed below, but my suggestions have been dismissed. I believe that there are many effective race-conscious strategies available to develop a racially and economically integrated housing plan along the corridor, but none have been recommended in the CCAHP. One such strategy that I believe could be particularly effective involves magnet schools at job centers near the University and/or between the State Capitol and the Saint Paul CBD, a strategy specifically endorsed in such situations by the Fair Housing Planning Guide. Another proven effective approach would be the introduction of stable integration strategies and plans that are effectively practiced in jurisdictions across the country, in both urban and suburban locations, in demographic situations very similar to those of the central corridor.

In contrast, CCAHP recommends the construction (or preservation) of up to 4,500 units of affordable housing along the corridor, despite the fact that the corridor already contains grossly disproportionate amounts of the region's subsidized or affordable housing (Maps 1 and 2). Only three percent of the seven-county region's housing is in the corridor, but *nearly four times* that percentage (11 percent) of subsidized housing units and *more than three times* that percentage of units affordable for very-low-income households (10 percent) are already there. Recent events also suggest that most of the new units will be built on the eastern end of the corridor in the poorest, most segregated,



# MAP 1: MINNEAPOLIS - SAINT PAUL (Central Region) Existing Subsidized Housing (2012) and Planned or Existing Light Rail (LRT) and Commuter Rail



In 2006-2010, a household with 50% of the median income, in the Minneapolis-St. Paul Metro Area, could afford a home valued at \$112,218, or a monthly rent of \$815. (50% of median income = \$32,591)

**Key:**  
Existing and Planned Future Commuter Rail Lines  
1/4 Mile Distance from:

- Central Corridor LRT (2015)
- Hiawatha LRT (existing)
- Southwest Corridor LRT (post 2020)
- NorthStar Commuter Rail (2010)

**Legend**  
Regional Value: 13.5%

Percentage Range	Count
0.0 to 3.4%	(123)
3.5 to 6.9%	(116)
7.0 to 13.4%	(133)
13.5 to 24.9%	(175)
25.0 to 39.9%	(129)
40.0% or more	(71)
No data	(3)

Note: Census Tracts with "No data" had fewer than 50 housing units in 2006-10.

**Key:**

## Existing and Planned Future Commuter Rail Lines

1/4 Mile Distance from:

Central Corridor LRT (2015)







Hiawatha LRT (existing)

Southwest Corridor LRT (post 2020)

NorthStar Commuter Rail (2010)

### Legend

Regional Value: 13.5%

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Note: Census Tracts with "No data" had fewer than 50 housing units in 2006-10.

and lowest-opportunity neighborhoods. In sum, the central corridor already has among the highest concentrations of both subsidized and affordable housing in the region—it doesn’t need more.

Based on recent past levels of housing production, this 4,500-unit goal would subsume a very large share of all of the federal, state, and local affordable-housing resources in the Twin Cities region. For instance, this represents about 50 percent more affordable units than were added to the entire region in 2009 and 2010 combined.<sup>1</sup> Further, this number would mean that a very large share—as high as 58 percent—of all housing units near light-rail stations in the corridor would be new or preserved low-income housing. (Today there are only 7,700 occupied housing units in total within a quarter mile of the stations).<sup>2</sup>

Such a lopsided effort would greatly intensify racial and economic segregation in the corridor, in areas that already include some of the region’s most segregated and lowest-opportunity neighborhoods and schools. The commitment of these resources to segregated, low-opportunity neighborhoods would inevitably reduce the production of new affordable housing in areas that offer residents better schools and higher opportunity. This diversion of affordable-housing resources has been a trend in the region in recent years. Between 2005 and 2011, \$32 million of housing tax credit requests were turned down for suburban affordable-housing projects, \$21 million of it denied in predominately white, high-opportunity suburbs. This funding was then often used to facilitate building units in areas of concentrated poverty and low opportunity.<sup>3</sup> Many of the units that would have been built in predominantly white, high-opportunity neighborhoods would have required far less public subsidy per unit and would have lower monthly rents.<sup>4</sup>

Unfortunately, despite the fact that the CCAHP is supported by a HUD Sustainable Communities grant, the plan nowhere mentions the FHA. The duty to affirmatively further fair housing is a broad remedial command in the FHA, which requires HUD and all recipients of federal housing assistance to use all their “immense leverage” to create racially “integrated and balanced living patterns.”<sup>5</sup> The duty to affirmatively further fair housing is only fulfilled when “the racial composition in assisted housing, in neighborhoods which are predominantly white, reflects the racial composition of the region as a whole.”<sup>6</sup> The federal courts have stated that housing plans and policies “that *maintain or increase* racial concentration” create “urban blight” and

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<sup>1</sup> See Metropolitan Council, MetroStats: Affordable Housing Production in the Twin Cities Region November 2011, at 1.

<sup>2</sup> U.S. CENSUS BUREAU, 2010.

<sup>3</sup> Calculations by author of Minnesota Housing, HTC Funding Award Recipients Reports.

<sup>4</sup> Based on an interview with and data from Mark Ulfers of Dakota County CDA.

<sup>5</sup> NAACP v. Sec’y of Hous. & Urban Dev., 817 F.2d 149, 156 (1st Cir. 1987) (citing NAACP v. Harris, 567 F. Supp. 637, 644 (D. Mass. 1983)). The First Circuit pragmatically argued the legislative history reflects an intention that HUD should “use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.” NAACP v. Sec’y of Hous. & Urban Dev., 817 F.2d at 155.

<sup>6</sup> NAACP v. Kemp, 721 F. Supp. 361, 371-72 (D. Mass. 1989).

are “prima facie” unacceptable under the FHA.<sup>7</sup> The CCAHP report fails to even mention the FHA, let alone consider CCAHP’s duty to affirmatively further fair housing under that law.

The FHA requires all recipients of federal housing assistance to take racial and socioeconomic data into consideration in all housing planning and siting decisions; a colorblind approach is “impermissible.”<sup>8</sup> Specifically, the FHA clearly requires HUD and all recipients of federal housing assistance to consider the racial balance of schools attended by government-supported low-income housing tenants.<sup>9</sup> The Supreme Court has repeatedly held that school and housing segregation are reciprocally related: illegal housing segregation causes school segregation and school segregation leads to segregation in housing.<sup>10</sup> The FHA regulations and the federal courts have recognized that it is virtually impossible to create stably integrated neighborhoods without taking into account the racial and social composition of local schools.

HUD’s Fair Housing Equity Assessment Grant Applications require grant recipients, such as the Met Council’s Corridors of Opportunity Program, to monitor both the racial balance *and* academic performance of local schools.<sup>11</sup> On February 23, 2010, Secretary Shaun Donovan made HUD’s Fair Housing priorities clear:

Sustainability also means creating “geographies of opportunity,” places that effectively connect people to . . . ***quality public schools***, and other amenities. Today, too many HUD-assisted families are stuck in neighborhoods of concentrated poverty and segregation, where one’s zip code ***predicts poor education***, employment, and even health outcomes. These neighborhoods are not sustainable in their present state.<sup>12</sup>

In order to prevent racial segregation, the FHA and its regulations presumptively prohibit the construction of new affordable housing in “an area of minority concentration,”<sup>13</sup> in neighborhoods of high poverty concentration,<sup>14</sup> resegregating neighborhoods,<sup>15</sup> neighborhoods detrimental to family life,<sup>16</sup> those with urban blight,<sup>17</sup>

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<sup>7</sup> Shannon v. United States Dep’t. of Hous. & Urban Dev. 436 F.2d 809, 821 (3rd Cir. 1970) (emphasis added).

<sup>8</sup> *Id.* at 820-21.

<sup>9</sup> *Id.* at 822; C.F.R. § 941.202(c)(1)(i) (2005).

<sup>10</sup> See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 20-21 (1971); Keyes v. Sch. Dist. No. 1, Denver, Colorado, 413 U.S. 189, 202-03 (1973); Milliken v. Bradley, 418 U.S. 717, 755 (1974).

<sup>11</sup> See FHEA, Addressing Equity and Opportunity: The Regional Fair Housing and Equity Grant Assessment Guidelines, August 2011.

<sup>12</sup> Written Testimony of Shaun Donovan, Secretary of U.S. Department of Housing and Urban Development, *FY 2011 Budget Request for HUD*, Feb 23, 2010 (emphasis added).

<sup>13</sup> 24 C.F.R. § 941.202(c)(1)(i) (2005).

<sup>14</sup> See § 941.202(d) (“The site must . . . avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.”).

<sup>15</sup> See § 941.202(c)(ii) (prohibiting siting in “[a] racially mixed area if the project will cause a significant increase in the proportion of minority to non-minority residents in the area”).

<sup>16</sup> See § 941.202(e) (“The neighborhood must not be one which is seriously detrimental to family life.”).

<sup>17</sup> See § 941.202(e).

and those without access to basic, decent public facilities and services such as education.<sup>18</sup> In direct contradiction to the FHA, the CCAHP uses an impermissible “colorblind analysis” and ignores all of HUD’s data requirements for housing planning.

Prior to the CCAHP, Saint Paul and Minneapolis, in accordance with the *Gautreaux* decision and the *Hollman* consent decree, designated a neighborhood with more than 30 percent non-white population as a neighborhood of minority concentration. Because context is important and the Twin Cities remains one of the nation’s whitest regions (with just 21 percent non-white residents in 2010), this number should be considered, if anything, an upper bound.<sup>19</sup> This legal definition, used historically by the central cities, also comports well with clear social-science research demonstrating that neighborhoods with more than a 30 percent non-white population are unlikely to stay racially or economically integrated over time.<sup>20</sup> Recent research at the Institute on Metropolitan Opportunity has shown that these types of neighborhoods are at high risk of resegregating.<sup>21</sup> This means that many of the neighborhoods that the CCAHP intends to make eligible for subsidized housing are the ones at the threshold of transition.

Driven by the CCAHP, both central cities have improperly changed their own definitions of minority concentration. Minneapolis raised its definition of minority concentration to 50 percent, twenty points past a stable integration threshold,<sup>22</sup> and Saint Paul, in order to justify concentrations of affordable housing on the deeply segregated eastern side, has declared that a neighborhood that is 78 percent non-white is not a minority neighborhood.<sup>23</sup> To put this number in perspective, HUD uses a 50 percent figure as its upper bound and applies it nationwide to metropolitan areas much more diverse than the Twin Cities.

The Sustainable Communities Initiative Grant that funds the project requires the creation of a Fair Housing Equity Assessment (FHEA). The FHEA requires assessment of segregated areas, racially/ethnically concentrated areas of poverty, and fair housing.<sup>24</sup> This analysis is required to be done on a regional scale.<sup>25</sup> The preliminary evaluation of

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<sup>18</sup>See § 941.202(e) (“The housing must be accessible to social, recreational, educational, commercial, and health facilities and services, and other municipal facilities and services.”).

<sup>19</sup> See FHEA Data Documentation, Draft August 2012.

<sup>20</sup> See GEORGE C. GALSTER, NEIGHBORHOOD SOCIAL MIX: THEORY, EVIDENCE AND IMPLICATIONS FOR POLICY AND PLANNING, Department of Urban Studies and Planning, Wayne State University (January 2010).

<sup>21</sup> See MYRON ORFIELD & THOMAS LUCE, AMERICA’S RACIALLY DIVERSE SUBURBS: OPPORTUNITIES AND CHALLENGES, Institute on Metropolitan Opportunity (July 20, 2012), *available at* [http://www.law.umn.edu/uploads/e0/65/e065d82a1c1da0bfef7d86172ec5391e/Diverse\\_Suburbs\\_FINAL.pdf](http://www.law.umn.edu/uploads/e0/65/e065d82a1c1da0bfef7d86172ec5391e/Diverse_Suburbs_FINAL.pdf); INSTITUTE ON RACE AND POVERTY, A COMPREHENSIVE STRATEGY TO INTEGRATE TWIN CITIES SCHOOLS AND NEIGHBORHOODS 20-22 (July 2009), *available at* [http://www.irpumn.org/uls/resources/projects/Regional\\_Integration\\_Draft\\_3\\_-\\_Long\\_Version.pdf](http://www.irpumn.org/uls/resources/projects/Regional_Integration_Draft_3_-_Long_Version.pdf).

<sup>22</sup> See Minneapolis Consolidated Plan for Housing and Community Development; One Year Action Plan, June 1, 2012-May 31, 2013 at 38.

<sup>23</sup> See St. Paul Consolidated Plan Consolidate Plan and Submission 2010-14 at 63 (“The City defines an area of minority group concentration as a census tract that has 78 percent or more minority population.”)

<sup>24</sup> Memorandum to Sustainable Communities Regional Planning Grantees, HUD (January 2012).

<sup>25</sup> *Id.*

the region based on HUD's guidelines (described below) reveals segregation and racially concentrated areas of poverty along the central corridor. The FHEA uses the Fair Housing Act as its benchmark for evaluating fair housing in the region.<sup>26</sup> Under federal law grantees are also required to conduct an Analysis of Impediments that addresses impediments to fair housing.<sup>27</sup> The CCAHP plan contravenes federal housing law and the pro-integrative, pro-fair housing, intent of the HUD Sustainable Communities Initiative.

## Segregation and Poverty in the Central Corridor

Neighborhoods surrounding the Central Corridor have had persistent patterns of racial segregation and increasing concentrations of poverty. Minneapolis and Saint Paul planning districts that contain parts of the central corridor were 39 percent non-white in 2010, a slight increase from 2000 (Table 1).<sup>28</sup> Areas neighboring LRT station sites on the corridor have detrimental patterns of segregation, concentrated poverty, and low incomes (Table 1 and Maps 3 and 4). The population living in census blocks within a quarter mile of LRT stations was 59 percent non-white—fully 20 points higher than in the larger planning areas. Poverty rates were also higher and climbing faster in areas close to LRT stations compared to the larger area. The poverty rate for those in census tracts intersecting station sites was 39 percent and climbing. Income and income growth were also much lower closer to the station sites.

**Table 1: Race, Poverty and Income in Central Corridor, 2000 to 2010**

	<u>2000</u>	<u>2010*</u>	<u>Change</u>
<u>Corridor Planning Districts Area</u>			
Percent Non-White	38	39	1
Poverty Rate	21	27	7
Median Income	\$37,305	\$45,346	22
<u>Areas Near LRT Stations</u>			
Percent Non-White	61	59	-3
Poverty Rate	27	39	12
Median Income	\$29,466	\$31,165	6

\*2010 poverty and income figures are from 2006-2010 U.S. Census American Community Survey  
Minority population includes Hispanics, regardless of race.

Median Income Change is reported as percentage change, the remaining change figures are recorded as percentage point changes. The 2000 figure is not adjusted to 2010 dollars.  
Consumer price index inflation increased 25% between 2000 and 2008.

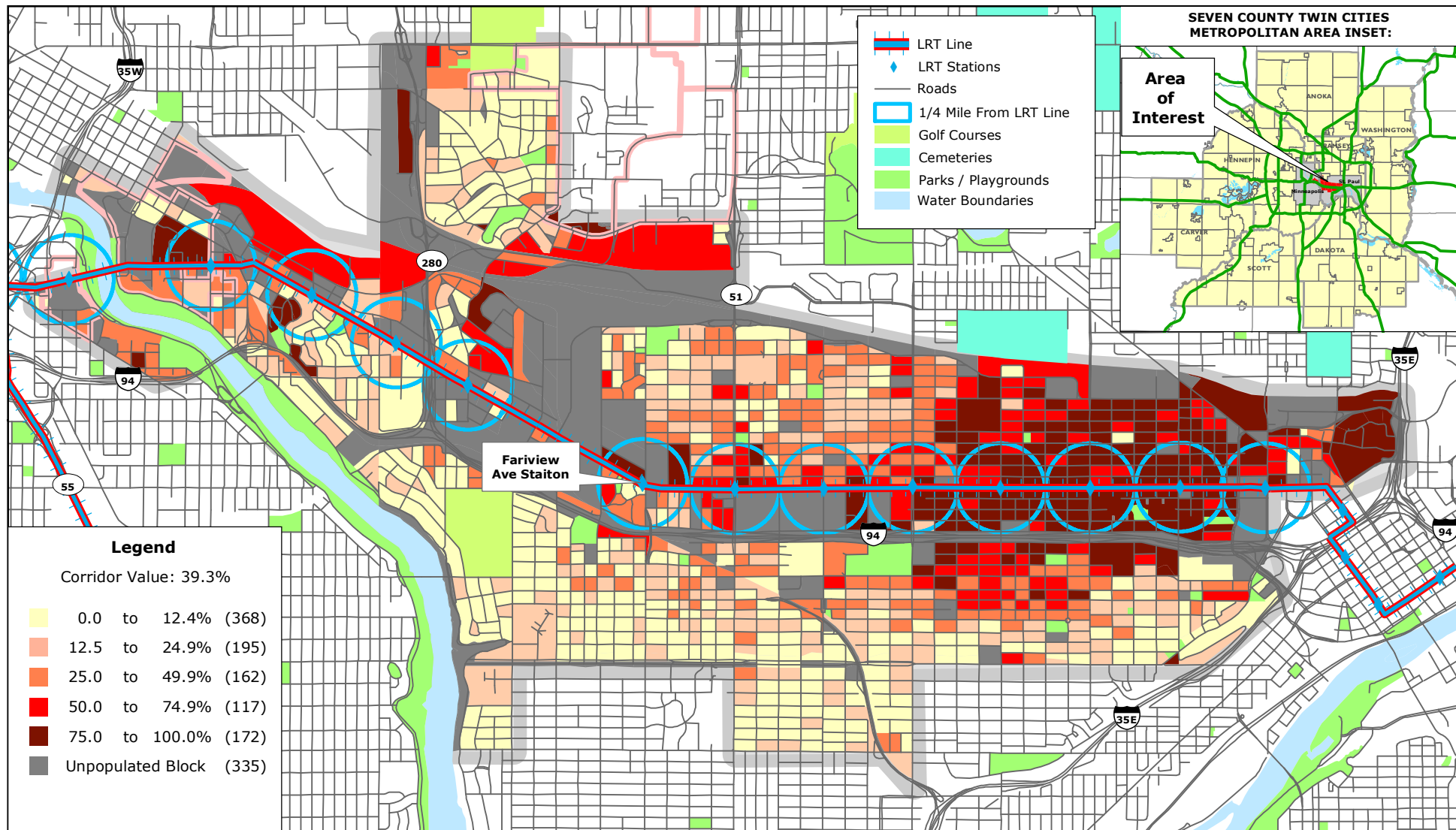
Source: U.S. Census Bureau

<sup>26</sup> Addressing Equity and Opportunity: The Regional Fair Housing and Equity Assessment Grant Obligation (webinar).

<sup>27</sup> *Id.*

<sup>28</sup> The poverty rate in the planning area was 27 percent in 2006-10, up 7 points from 2000. Similarly, household income was \$45,346, just 70 percent of the regional median income in 2006-2010, and had increased at a rate less than inflation during the decade.

# MAP 3: CENTRAL CORRIDOR AREA Percentage Minority Population by Census Block, 2010

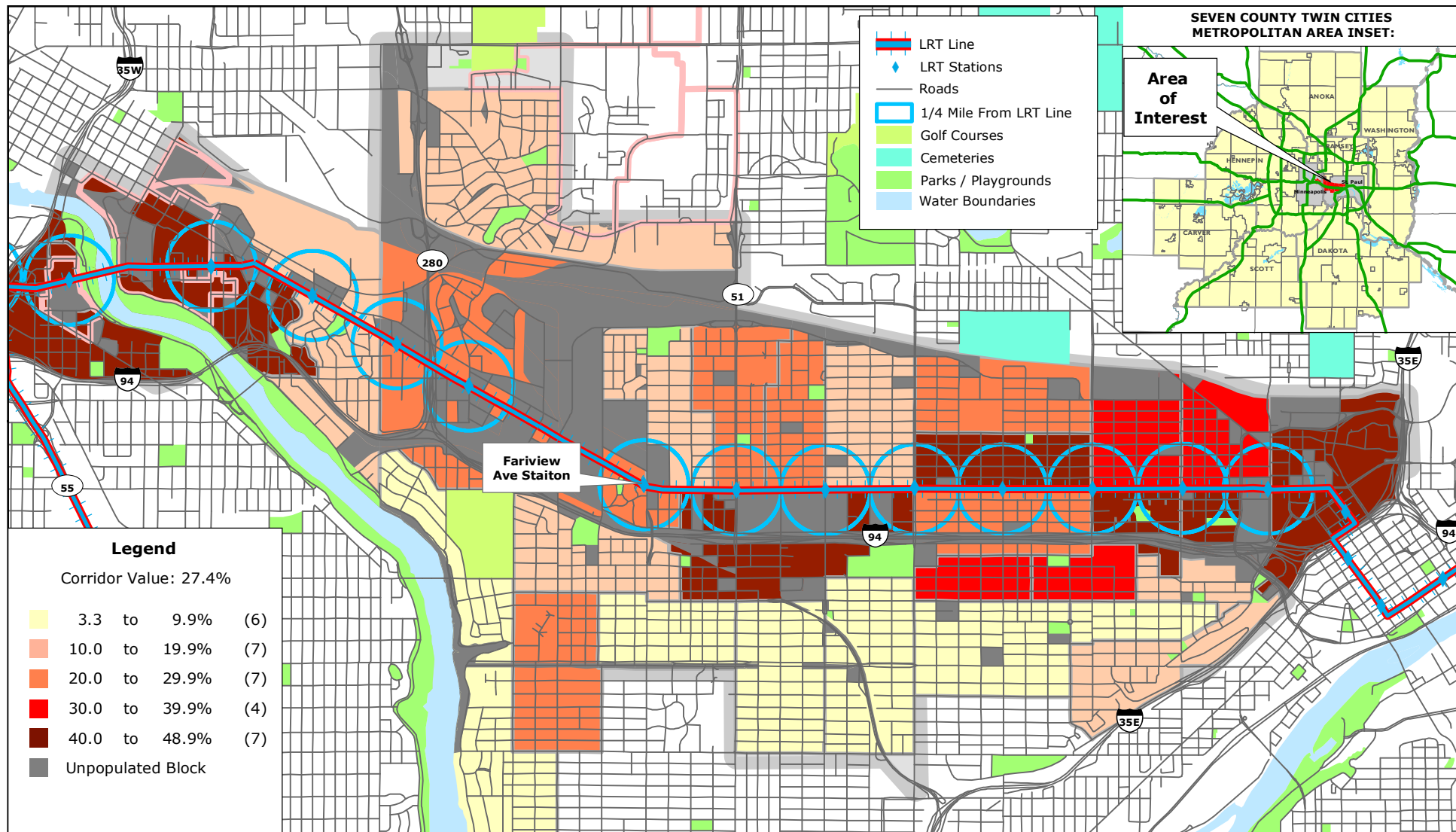


Data Sources:  
2005 The Lawrence Group  
2005 Metropolitan Council  
2002 Minnesota Department of Transportation  
2004 Ramsey County Regional Railroad Authority  
2010 U.S. Census SF1

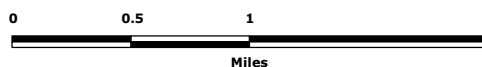
Note: University Corridor Area consists of 33 U.S. Census Transportation Analysis Zones that are contained or somewhat contained by the St. Paul neighborhoods of St. Anthony Park, Hamline Midway, Merriam Park, Lexington-Hamline, Thomas-Dale and the Minneapolis neighborhoods of Prospect Park/ E. River Road and University.



# MAP 4: CENTRAL CORRIDOR AREA Percentage Persons Below Poverty Line by Census Tract, 2006-2010 (5-year Average)



Data Sources:  
 2005 The Lawrence Group  
 2005 Metropolitan Council  
 2002 Minnesota Department of Transportation  
 2004 Ramsey County Regional Railroad Authority  
 2010 U.S. Census, American Community Survey



Note: University Corridor Area consists of 33 U.S. Census Transportation Analysis Zones that are contained or somewhat contained by the St. Paul neighborhoods of St. Anthony Park, Hamline Midway, Merriam Park, Lexington-Hamline, Thomas-Dale and the Minneapolis neighborhoods of Prospect Park/ E. River Road and University.



Racial and economic patterns were not uniform along the corridor. Areas near the eastern LRT stations, from Fairview Avenue Station to the Capitol, were considerably more racially segregated than the western portion of the corridor, with 2010 non-white shares of 75 percent in the eastern portion, compared to only 29 percent in the western portion (Table 2). Targeting affordable housing near the station sites on the eastern portion of the corridor would add to the already high levels of segregation in the area. Although poverty was higher and income was lower in the western portion of the corridor, the difference is attributable to the presence of University of Minnesota college students in the western portion. In 2006-10, 56 percent of residents in the western portion of the corridor were college students, compared to only 13 percent in the east. When college students are excluded from the poverty calculation, the poverty rates were identical in the two areas.

**Table 2: Race, Poverty and Income in East and West Central Corridor, 2000 to 2010**

	<u>2000</u>	<u>2010*</u>	<u>Change</u>
<u>Areas Near East Station Sites</u>			
Percent Non-White	73	75	2
Percent in College	11	13	2
Poverty Rate	23	33	10
Non-College Poverty Rate		32	
Median Income	\$31,659	\$34,318	8
<u>Areas Near West Station Sites</u>			
Percent Non-White	21	29	8
Percent in College	50	56	6
Poverty Rate	33	47	13
Non-College Poverty Rate		32	
Median Income	\$26,192	\$27,010	3

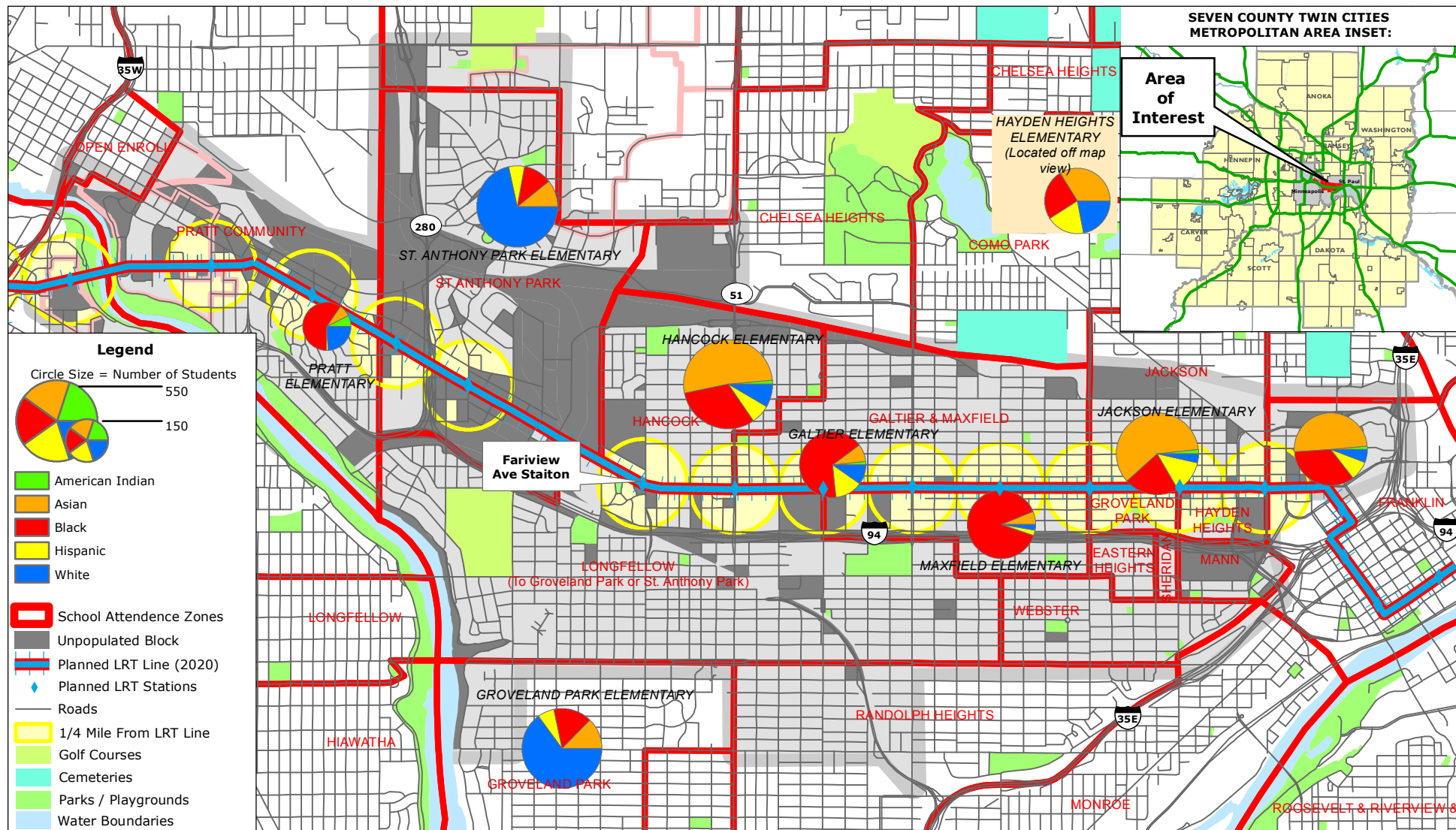
\*2010 poverty and income figures are from 2006-2010 U.S. Census American Community Survey  
Minority population includes Hispanics, regardless of race.

Median Income Change is reported as percentage change, the remaining change figures are recorded as percentage point changes. The 2000 figure is not adjusted to 2010 dollars.  
Consumer price index inflation increased 25% between 2000 and 2008.

Source: U.S. Census Bureau

The compositions of the elementary schools serving the corridor show an even starker contrast between the eastern and the western portions (Table 3 and Map 5). The five schools east of the Fairview station were each more than 90 percent non-white and poor in 2011-12 and both rates increased in every one of those schools from 1997-98. In 2011-12, the percentages of students in these schools who were proficient in math and reading were just 33 and 44 percent on average. In contrast, two of the three schools west of Fairview were less than 36 percent non-white and poor in 2011-12 and both rates were decreasing in each. Math and reading proficiency rates in these schools were 71 and 85

# MAP 5: CENTRAL CORRIDOR AREA Size and Distribution of Elementary Students by Race for Schools with Attendance Areas within 1/4 mile of LRT Stations, 2009



Data Sources:  
2005 The Lawrence Group  
2005 Metropolitan Council  
2002 Minnesota Department of Transportation  
2004 Ramsey County Regional Railroad Authority  
2009 Minnesota Department of Education



Note: University Corridor Area consists of 33 U.S. Census Transportation Analysis Zones that are contained or somewhat contained by the St. Paul neighborhoods of St. Anthony Park, Hamline Midway, Merriam Park, Lexington-Hamline, Thomas-Dale and the Minneapolis neighborhoods of Prospect Park/ E. River Road and University.

percent on average. (The rates in the third western school, Pratt Elementary, fell between the other two schools.)

**Table 3: Race and Poverty in Central Corridor Elementary Schools, 1997-98 - 2011-12**

	% Non-white			% Free or Reduced Price Lunch Eligible		
	1997-98	2011-12	Change	1997-98	2011-12	Change
<u>West of Fairview Station</u>						
Pratt <sup>*</sup>	58	75	17	53	71	18
St. Anthony Park	51	31	-20	47	23	-24
Groveland	43	36	-7	39	36	-3
Average	51	47	-4	46	43	-3
<u>East of Fairview Station</u>						
Hancock	81	94	13	89	93	4
Galtier	70	90	21	77	93	16
Maxfield	74	97	24	78	99	21
Jackson	70	97	27	82	91	9
Franklin <sup>**</sup>	75	93	18	88	96	8
Average	74	94	20	83	94	12

\*: Pratt data are for 2004-05 and 2011-12.

\*\*: Franklin data are for 1997-98 and 2010-11.

Source: Minnesota Department of Education.

In sum, contrary to law, CCAHP proposes to place a disproportionate share of the region's affordable housing in neighborhoods that are over 50 percent non-white (beyond HUD's highest threshold), that are served by segregated schools in neighborhoods, that are "areas of minority concentration,"<sup>29</sup> that have high poverty concentration,<sup>30</sup> that face resegregation,<sup>31</sup> that are neighborhoods detrimental to family life,<sup>32</sup> that have urban

<sup>29</sup> 24 C.F.R. § 941.202(c)(1)(i) (2005).

<sup>30</sup> See § 941.202(d).

<sup>31</sup> See § 941.202(c)(ii).

<sup>32</sup> See § 941.202(e) ("The neighborhood must not be one which is seriously detrimental to family life.").

blight,<sup>33</sup> and that are without access to basic, decent public facilities and services such as education.<sup>34</sup>

### Other Social and Economic Factors

Based on the combination of segregation and discrimination by lending institutions, the neighborhoods targeted by the CCAHP are also subject to other socioeconomic disadvantages. During the housing bubble period of 2004 to 2006, subprime lending rates were high in the corridor, particularly in areas near LRT stations east of the Fairview Avenue station (Table 4). In fact, subprime lending rates were almost three times higher in the eastern portion of the corridor than in the western portion. Likewise, recent mortgage-denial rates are also highest near station sites in the eastern portion of the corridor. The CCAHP outlines no plan to redress the likely increased lending discrimination that will undoubtedly accompany the increasing neighborhood segregation their plan will foster.

**Table 4: Mortgage Lending in Central Corridor Neighborhoods**

	Percent Subprime	Percent Denial
	<u>2004-06</u>	<u>2008-10</u>
Corridor Planning Districts Area	20	18
Near LRT Stations	26	24
Near East Station Sites	29	26
Near West Station Sites	10	16
Total Metro	17	9

Source: Home Mortgage Disclosure Act.

Areas in the corridor also have among the worst health outcomes in the region. For instance, mortality rates range from a quarter to twice as high as those of the region as a whole (Table 5). By further concentrating poverty, already-poor health prospects in the corridor will diminish further.

<sup>33</sup> See § 941.202(e) (“The site must be free from adverse environmental conditions, natural or manmade.”).

<sup>34</sup> See § 941.202(e) (“The housing must be accessible to social, recreational, educational, commercial, and health facilities and services, and other municipal facilities and services.”).

**Table 5: Mortality Rate in 2005-2007 by Central Corridor Zip Codes**

	Age Standardized Death Rate*	Zip Code to Metro Ratio
<u>East Zip Codes:</u>		
55103	523	2.11
55104	348	1.40
<u>West Zip Codes:</u>		
55114	606	2.44
55414	382	1.54
55454	311	1.25
7 -County Metro Total	248	

\* among the population aged 25-64

Sources: Minnesota Department of Health, Wilder Research,  
*The unequal distribution of health in the Twin Cities*

Finally, neighborhoods in the Central Corridor have some of the highest crime rates in the region. Crime rates are particularly high in the neighborhoods in the eastern portion of the corridor (Table 6). By further concentrating poverty, crime rates will likely increase again, and crime victims will often be the residents of the neighborhoods.

**Table 6: Serious Crime Rates per 100,000 in 2010 by Central Corridor Neighborhood**

	Crime Rate
<u>East Neighborhoods:</u>	
Hamline Midway	5,102
Summit University	5,019
Thomas-Dale	5,107
Union Park	7,737
<u>West Neighborhoods:</u>	
Cedar Riverside	4,250
Prospect Park	4,197
Saint Anthony (St. Paul)	4,658
Saint Paul Total	4,811
Minneapolis Total	5,518
7 -County Metro Total	3,663

Sources: FBI Uniform Crime Report,  
Minneapolis and Saint Paul PD

## Inaccurate Concerns Regarding Gentrification

The CCAHP asserts that the new LRT lines will cause gentrification, so it is therefore necessary to build all of the region's affordable housing there to assure that low-income people can remain. But a GAO study, posted on the CCAHP website itself, disputes the validity of the CCAHP's gentrification methodology and results. It summarizes peer-reviewed studies, demonstrating that transit stops in segregated, high-poverty neighborhoods—as opposed to stably integrated or white neighborhoods—often experience a decline in property values, and are thus more likely to intensify poverty and segregation, rather than be associated with gentrification.<sup>35</sup> The GAO reported the findings of an Atlanta study that found the presence of crime near rail stations limited increases in value and sometimes even decreased land value and housing values.<sup>36</sup> It also reported on a study from Buffalo, NY that found a negative effect of housing values around stations in low-income areas.<sup>37</sup>

It is at these types of stops that the CCAHP seeks to concentrate a disproportionate share of the region's affordable housing. Moreover, despite the CCAHP's posturing to the contrary, even its own study (whose methodology is questioned by the GAO) finds that “**gentrification is not currently in progress in the Central Corridor.**”<sup>38</sup> Specifically, its consultant PolicyLink found that no submarket along the corridor met the requirements demonstrating gentrification in any of the studies it could find.<sup>39</sup>

An examination of the indicators of gentrification used by PolicyLink is revealing. The first factor “rising rents and home values” is not met. As PolicyLink acknowledges, rents have risen “at a low rate” in the Central Corridor.<sup>40</sup> However, PolicyLink declares that home values are “rising sharply” and that the “largest home value increases in [the] last decade were in the east submarket . . . and capitol submarket.”<sup>41</sup> However, this analysis is based on the years 2000-2009. There has been a

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<sup>35</sup> United State Government Accountability Office, General Accounting Office Affordable Housing and Transit Oriented Development: Key Practices Could Enhance Collaboration Effort Between DOT FTA and HUD, September 2009 (GAO-09-871); Report to the Chairman, Subcommittee on Transportation, Housing and Urban Development, and Related Agencies, Committee on Appropriations, U.S. House of Representatives at 13-14.

<sup>36</sup> D.R. Bowes & K.R. Ihlanfeldt, *Identifying the Impacts of Rail Stations on Residential Property Values*, 50 J. URB. ECON. 1, 1-25 (2001).

<sup>37</sup> Daniel Baldwin Hess and Tangerine Maria Almeida, *Impact of Proximity to Light Rail Rapid Transit Stations on Station Area Property Values in Buffalo NY*, 22 URB. STUD. 1041 (2007).

<sup>38</sup> See SHIREEN MALAKAFZALI AND DANIELLE BERGSTOM, HEALTHY CORRIDOR FOR ALL: A COMMUNITY HEALTH ASSESSMENT OF TRANSIT ORIENTED DEVELOPMENT POLICY IN SAINT PAUL, MINNESOTA. TECHNICAL REPORT 65 (POLICYLINK 2011) [*hereinafter*, POLICYLINK, TECHNICAL REPORT].

<sup>39</sup> *Id* at 63. No submarket “meets all six indicators for gentrification in the [study period].” Referencing STEPHEN POLLACK, BARRY BLUESTONE, AND CHASE BILLINGHAM, MAINTAINING DIVERSITY IN AMERICA’S TRANSIT-RICH NEIGHBORHOODS: TOOLS FOR EQUITABLE NEIGHBORHOOD CHANGE (Dukakis Center for Urban and Regional Policy 2010) [*hereinafter* POLLACK ET AL., HEALTHY CORRIDOR] and MAUREEN KENNEDY & PAUL LEONARD, DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES (Brookings April 2001).

<sup>40</sup> See POLICYLINK, TECHNICAL REPORT at 64.

<sup>41</sup> *Id*.

dramatic decrease in housing prices over the last few years, only bottoming out in St. Paul in early 2012. There has also been a high rate of foreclosures in the central corridor during this time, with property values in the eastern and central submarkets being badly affected (as will be discussed below). Without knowing how the markets in these areas, and the corridor as a whole, have fared in the last few years, it is impossible to state that housing values have been “rising sharply” with any degree of relevant accuracy. Other indicators (property values, foreclosure rates) suggest that they have fared poorly.

In terms of the other indicators of gentrification, PolicyLink acknowledges that there has been no decrease in racial diversity and lower-income people have not been exiting the central corridor. In fact, there has been an increase in poverty in the corridor over the last 10 years. From 2000-2010 the percentage of individuals living in the central corridor with incomes below the county median skyrocketed from 34 percent to 60 percent. Conversely, during the same time period, the percentage of individuals with double the county median income rose only slightly from 10 percent to 12 percent.<sup>42</sup>

PolicyLink asserts that there has been an increase in property values. However, in Policy Link’s “Summary Report” they examine property value changes from 2007-2010--i.e. after the bursting of the housing bubble. During this time, only four station areas have seen any sort of dramatic increase in property values. The rest have seen stagnant or decreasing housing values, including every station area in the eastern and central submarkets.<sup>43</sup> Figure 10 on page 27 of their report reveals a housing market that is very fragile in all but a few station areas.<sup>44</sup> PolicyLink declares that there has been an increase in educational attainment in the central corridor.<sup>45</sup> However, in their summary report they note that “[central corridor] residents have lower educational attainment levels than the county average.”

Overall, it is clear that indicators of gentrification are not evident. The central corridor, and especially the east and capitol submarkets, remains impoverished and segregated.

While PolicyLink offhandedly suggested a “risk of gentrification that should be monitored,” it actually found that the corridor did not exhibit the necessary factors to conclude that there was a future risk of gentrification.<sup>46</sup> Most notably in terms of risk for future gentrification, PolicyLink concluded that the corridor lacked “a high density of amenities including youth facilities and public space” and necessary number of workers using public transit.<sup>47</sup> All of the other factors present—such as proximity to transit—a

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<sup>42</sup> See POLICYLINK, TECHNICAL REPORT at 64-65.

<sup>43</sup> See SHIREEN MALAKAFZALI AND DANIELLE BERGSTOM, HEALTHY CORRIDOR FOR ALL: A COMMUNITY HEALTH ASSESSMENT OF TRANSIT ORIENTED DEVELOPMENT POLICY IN SAINT PAUL, MINNESOTA, SUMMARY, 27 fig. 10 (PolicyLink 2011) [*hereinafter*, POLICY LINK, SUMMARY REPORT].

<sup>44</sup> *Id.*

<sup>45</sup> See POLICYLINK, TECHNICAL REPORT at 64-65.

<sup>46</sup> *Id.* at 66-68 citing KAREN CHAPPEL, MAPPING SUSCEPTIBILITY TO GENTRIFICATION: THE EARLY WARNING TOOLKIT (Center for Community Innovation at Institute of Urban and Regional Development, 2009) [*hereinafter* CHAPPEL, MAPPING SUSCEPTIBILITY].

<sup>47</sup> *Id.*

high number of rental, non-family, rent-burdened households are present in virtually every poor urban neighborhood in America.

PolicyLink's analysis is flawed for another reason; they used only a single study to determine risk indicators of gentrification, a study that examined gentrification only in the California Bay Area.<sup>48</sup> As the study noted, "[t]he Bay Area has one of the most expensive and challenging housing markets in the country."<sup>49</sup> It is therefore unclear if their findings of risk indicators are generalizable to other metropolitan areas.

The relevance of the Bay Area findings to the Central Corridor, in particular, is very unclear. For instance, the study found that a higher percentage of non-Hispanic whites, a greater distance to San Francisco, and a greater percentage of three or more vehicles per household were factors that decrease the risk of gentrification.<sup>50</sup> Conversely, non-family households and apartment buildings with a greater number of units were found to increase the risk of gentrification.<sup>51</sup> It is unclear how helpful these indicators are except in demonstrating that single-family, white suburbs are not at risk of gentrification.

As noted by a study from the Dukakis Center, the findings from the Bay Area indicated that "while some transit-rich neighborhoods were gentrifying, others were experiencing very different patterns of change."<sup>52</sup> These included areas that were becoming "bipolar" and lower income.<sup>53</sup> Importantly, PolicyLink, in their technical report, described the central corridor as exhibiting "bipolar" trends.<sup>54</sup> Furthermore, the study does not measure changes to racial segregation or integration directly.

The study by the Dukakis Center that was cited by PolicyLink noted that the addition of transit to neighborhoods can lead to increased poverty.<sup>55</sup> It also found that half of transit-rich neighborhoods saw their non-Hispanic white population decline or experience slower growth than the metropolitan area as a whole.<sup>56</sup> Similarly, it found that among cases where there was a substantial racial change of non-Hispanic whites in new transit-rich neighborhoods, as compared to the metro area, it was more likely to be a relative decrease, than increase.<sup>57</sup> These findings suggest that the new light rail stops are more likely to increase poverty and segregation in the central corridor than to lead to gentrification.

Finally, PolicyLink's projections for new housing units along the corridor are underwhelming. The estimates on page 38 of their technical report project that the growth in housing units will be concentrated in the western portion of the central corridor<sup>58</sup> and

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<sup>48</sup> CHAPPEL, MAPPING SUSCEPTIBILITY.

<sup>49</sup> *Id.* at 1.

<sup>50</sup> *Id.* at 6.

<sup>51</sup> *Id.*

<sup>52</sup> POLLACK ET AL., HEALTHY CORRIDOR at 19.

<sup>53</sup> CHAPPEL, MAPPING SUSCEPTIBILITY at 4.

<sup>54</sup> See POLICYLINK, TECHNICAL REPORT at 64.

<sup>55</sup> POLLACK ET AL., HEALTHY CORRIDOR at 19.

<sup>56</sup> *Id.* at 22.

<sup>57</sup> *Id.* at 27 (31 percent compared to 19 percent).

<sup>58</sup> See POLICYLINK, TECHNICAL REPORT at 38, fig. 3.2.



that market conditions will support the construction of only 6,775 new residential units along University Avenue in the next 20 years (with most on the western portion).<sup>59</sup> It is clear from the estimates made by PolicyLink that the eastern portion of the corridor is not a strong enough market to enable gentrification.

In sum, claims that the central corridor is at risk of gentrification are clearly overstated. The evidence points instead to a segregated area with concentrated poverty, which is more likely to experience further decline. Preemptively placing more affordable housing units in the area would only be likely to accelerate this decline.

### **Research Demonstrates the Likely Detrimental Effects of Subsidized Housing in Moderate- and High-Poverty Areas**

The CCAHP has already intensified the city's pattern of racial segregation by successfully lobbying both Minneapolis and Saint Paul to expand the neighborhoods eligible for subsidized housing to include census tracts with minority shares up to 50 and 78 percent respectively. Peer-reviewed research on the effects of subsidized housing on nearby properties implies that these types of neighborhoods are the ones most likely to be adversely affected by the addition of subsidized housing. George Galster's recent literature review concludes that neighborhood characteristics influence how subsidized housing affects surrounding areas and that there is growing evidence that neighborhoods with moderate home values and poverty rates are at greater risk of experiencing negative effects, even at lower concentrations of affordable or multi-family housing. He concludes that "affordable housing seems least likely to generate negative impacts when inserted into high-value, low poverty, stable neighborhoods."<sup>60</sup>

Similarly, a literature review by Abt Associates concluded that the effect of subsidized housing on nearby properties "appears to depend on the scale of the project and the stability of the neighborhood. A small project in a stable neighborhood has either no effect or a small positive effect. On the other hand, a project added to an unstable neighborhood, especially a large project, can either cause a decline in property values or prevent revitalization that would otherwise occur as a result of market forces."<sup>61</sup> The 4,500 units involved in the CCAHP clearly represent a major addition to the housing stock, considering that there are currently only 7,700 occupied housing units within a quarter mile of the stations.<sup>62</sup>

### **The Central Corridor's "Market-Building Strategy" Lacks Factual Support**

When the Institute on Metropolitan Opportunity (IMO) staff informed CCAHP representatives of these articles, they responded, without any evidence, that concentrating low-income housing subsidies in moderate-minority, moderate-poverty neighborhoods

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<sup>59</sup> See POLICYLINK, SUMMARY at 14.

<sup>60</sup> George Galster, *The Effects of Affordable and Multi-Family Housing on Market Values of Near Homes*, in GROWTH MANAGEMENT AND AFFORDABLE HOUSING 176, 176-211 (Anthony Downs, ed., 2004).

<sup>61</sup> JILL KHADDURI, KIMBERLY BURNETT & DAVID RODDA, TARGETING HOUSING PRODUCTION SUBSIDIES: LITERATURE REVIEW, Abt Associates, Cambridge MA (2003), 41, 63.

<sup>62</sup> U.S. CENSUS BUREAU, 2010.

would help build the housing markets in these areas.<sup>63</sup> They argued, among other things, that LIHTC housing “was not really affordable housing,” but rather “market rate housing” with higher rents than the local markets.<sup>64</sup> They also contended that the central cities had to use the LIHTC units in segregated neighborhoods because “the market was providing no private credit” there, while white neighborhoods of the city were brimming with credit and new rental housing.<sup>65</sup> In short, those areas are to receive no LIHTC units because they are thriving. CCAHP contends that the poor, segregated neighborhoods, which have no private market, have to be revitalized with more low-income family housing.

This argument is obviously completely inconsistent with CCAHP’s argument that the massive development of low-income housing is critical to stop overwhelming gentrification. In support of this so-called “market building” strategy, the only evidence the city provided was a non-peer-reviewed government report and a glossy industry trade publication that asserted—without any reviewable facts—that low-income housing helped build the housing market in a poor, all-white rural county in Indiana.<sup>66</sup> When questioned about the relevance of this “study” for construction of housing in racially segregated neighborhoods, particularly in light of several peer-reviewed studies to the contrary, the CCAHP could not produce relevant evidence that further concentrating low income housing in racially segregated neighborhoods would build these housing markets.

Eventually, CCAHP representatives did produce a literature review by the Center for Housing Policy (CHP) prepared for the MacArthur Foundation.<sup>67</sup> This piece was a non-peer-reviewed partial summary of the literature on related, but ultimately irrelevant, topics. A significant part of the article focuses on the economic effects of the construction activity associated with these programs and not on the question of longer-term economic effects on the neighborhoods themselves. The effects from construction activities, however, are short-lived and unlikely to be felt primarily by neighborhood residents.

The CHP review also highlights other issues of only limited relevance in the current case. These include effects on homebuyers, which are not relevant for the LIHTC and Section 8 programs at issue in the corridor. There is also a discussion of how affordable housing can help local employers by providing housing for low- and moderate-wage workers. But this argument is more relevant for projects in areas where the non-subsidized market is high-rent or largely owner-occupied, which is not the case in the development area in question. There is some discussion of how projects affect nearby market values. This information is relevant but the review focuses on only a particularly rosy evaluation of a single study in New York City, with no mention of the broader reviews noted above. Finally, there is a section on other potential spillover

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<sup>63</sup> See Testimony of Thomas Streitz, April 3, 2012, Minneapolis Community Development Committee Meeting.

<sup>64</sup> See correspondence with city staff (attached as Appendix).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> KEITH WALDRIP, LAURA WILLIAMS & SUZANNE HAGUE, THE ROLE OF AFFORDABLE HOUSING IN CREATING JOBS AND STIMULATING LOCAL ECONOMIC DEVELOPMENT: A REVIEW OF THE LITERATURE, CENTER FOR HOUSING POLICY, 2011.

effects—an issue that is potentially very relevant. However, the section essentially highlights the lack of findings in this regard and recommends that more research is needed on the issue.

In response to a draft version of this letter, two additional studies were cited to counter claims that LIHTC housing can have detrimental effects on moderate- and high-poverty neighborhoods.<sup>68</sup> The response claims that “it’s clear that well designed and well managed affordable housing tends to stabilize low income neighborhoods and that new tax credit housing tends to increase median neighborhood income” However, the cited studies do little to support this claim. Baum-Snow & Marion (2009) in fact conclude: “We find that LIHTC developments **depress local median household income** . . . in owner occupied housing units within 1 km of these projects.”<sup>69</sup>

The other study (Deng (2009)) examines the impacts of LIHTC developments in Santa Clara County.<sup>70</sup> The study notes that Santa Clara has an unusually “tight market environment”,<sup>71</sup> “few distressed neighborhoods”, and “thanks to strong economic growth”,<sup>72</sup> is “largely dominated by low-density developments”.<sup>73</sup> Furthermore, the county has a median income twice that of the national average, meaning that “LIHTC tenants with 50% or 60% AMI in Santa Clara County may have income[s] similar to middle-income families in other places”.<sup>74</sup> Importantly, the distribution of LIHTC housing in Santa Clara County by neighborhood type was as follows:

Upper income, white dominated 17 percent  
Upper income, white/Asian mix 10 percent  
Middle class, white dominated 24 percent  
Working class, white Asian mix 33 percent  
Working class, Asian/Hispanic mix 4 percent  
Low income, Hispanic dominated 7 percent  
Low income, racially mixed 5 percent<sup>75</sup>

LIHTC units were concentrated in upper income and white middle income neighborhoods, with only 16 percent of units placed in low income or working class Asian/Hispanic neighborhoods. This is the type of pro-integrative placement strategy that I endorse and would encourage the CCAHP to adopt. It stands in sharp contrast to the CCAHP’s current plan, which concentrates LIHTC units in poor and segregated parts of the region.

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<sup>68</sup> Nathaniel Baum-Snow and Justin Marion, The Effects of Low Income Housing Tax Credit Developments on Neighborhoods, 93 *Journal of Public Economics* 654, 665 (2009) and Lan Deng, The External Neighborhood Effects of Low-Income Housing Tax Credit Projects Built By Three Sectors, 33 *Journal of Urban Affairs* 143.

<sup>69</sup> Baum Snow & Marion at 665 (emphasis added).

<sup>70</sup> Deng at 143.

<sup>71</sup> Id. at 145

<sup>72</sup> Id. at 146

<sup>73</sup> Id. at 145.

<sup>74</sup> Id. at 149.

<sup>75</sup> Id. at 152.

Furthermore, even though the study found that housing values rose around LIHTC developments the authors conclude with the caveat that:

Yet, while this study has found positive impacts from the LIHTC projects in both high-income and low income neighborhoods, the Denver studies have emphasized more about neighborhood contexts. Scattered-site public housing developments in Denver increased nearby property value in middleclass neighborhoods, **but their impacts became negative in low-income, black neighborhoods** (Galster et al., 2003; Santiago et al., 2001). Part of the difference may be because the LIHTC projects in Santa Clara County serve households with much higher income than the public housing projects in Denver. As a result, even if the LIHTC projects were placed in low-income neighborhoods, they did not significantly increase the concentration of poverty. Moreover, **since Santa Clara County only has a very small share of black residents, about 3% countywide, it may also be difficult to discern the projects' impacts in black neighborhoods.**<sup>76</sup>

Clearly, the Santa Clara results are of very limited relevance, and other cited studies of areas much more like the Corridor support my arguments regarding the negative impacts of adding subsidized units to low-income or segregated neighborhoods.

For these reasons, I request the opportunity to present further proposals to the board of the Central Corridor Funder's Collaborative. I have suggested many ideas to create a pro-integrative plan on the corridor, particularly the addition of magnet schools at job centers near the University or between the State Capitol and the Saint Paul CBD. It would also be beneficial to develop a stable, racially integrated, mixed-income housing strategy. The Institute on Metropolitan Opportunity would be happy to help undertake the necessary revisions to housing strategy and the report that will help it conform both to the terms of HUD Sustainable Communities grant and to the larger framework of the FHA. This can be quickly accomplished to the benefit of the region's non-white citizens and the quality of life in neighborhoods along the central corridor.

Sincerely,

Myron Orfield

Professor of Law and Director of the  
Institute on Metropolitan Opportunity,  
University of Minnesota

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<sup>76</sup> Id. at 161. Emphasis added.